INDEX.

ACT, AUTHENTIC.

1. One, not a party to a notarial act, may prove its falsehood by competent evidence. *Mathews* v. *Boland*, 200.
2. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Norès* v. *Carraby*, 292.

See NOTARY, 1.

ACTION.

See PLEADING.

ACT, SOUS SEIGN PRIVÉ.

An act, not authentic for want of form, will be obligatory as one *sous seign privé*. C. C. 2232. *Dugat* v. *Comeau*, 475.

ADMINISTRATOR.

See SUCCESSIONS.

ADMISSIONS.

See EVIDENCE, XIV. PLEADING, VII.

ADVOCATE.

See ATTORNEY AT LAW.

AGENCY.

1. One who pays a draft which has been fraudulently raised to a larger

amount, must bear the loss of the difference between the amount so paid, and that for which the draft was given. *Dunbar* v. *Armor*, 1.

2. Where a slave, concealed on board a vessel, is carried away and lost to the owner, the master and owners of the vessel will be responsible for his value, though he was received on board by a person employed on the vessel, contrary to the orders, and without the knowledge of the master and owners thereof. The latter are answerable for the damage occasioned by the acts of those they employ, and cannot excuse themselves on the plea, that they were done contrary to their orders, and without their knowledge. C. C. 2299. *Winston* v. *Foster*, 113.

3. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned by want of care or skill in those in charge of the boat. *Kelly* v. *Benedict*, 138.

4. Action to recover the amount of certain notes delivered to defendant for collection, with directions to apply the proceeds in a particular way, and not accounted for. Defendant having answered, that he is not indebted to plaintiff, and had been always ready to account, an interlocutory judgment was rendered, ordering him to file an account within a fixed period. No account being filed within the time, a rule to show cause why he should not be ordered to pay the amount claimed, was made absolute, and judgment rendered for the amount. On appeal; *held*, that the judgment should be affirmed. *Nichols* v. *Nichols*, 175.

5. The consignees of a vessel, who receive goods belonging to a third person residing in another place, and re-ship them by a steamer to him, will not be responsible for any loss resulting from a fortuitous event, as the snagging of the steamer, where compensation is claimed only on the ground, that the goods should have been re-shipped sooner, and not for the omission to insure. *Deaver* v. *Bedford*, 245.

5. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them. *Ib.*

7. Where a factor or merchant accepts a bill on the faith of produce consigned to him, it must be considered as an advance on it, and he has, for the amount thereof, the same privilege as though the advance had been made in money; and other creditors, who have no privilege, cannot take the property from him, without paying his advances. *Lambeth* v. *Turnbull*, 264.

8. A creditor of a consignor, who has attached property of his debtor, in the hands of a consignee, who claims a privilege for acceptances made by him on the faith of the consignment, must show, in order to take the property out of the hands of the latter without paying the amount of his acceptances, that the acceptances were not made in good faith, and that the consignee is not bound to pay them. *Ib.*

9. The interest of the party by whom property is held as security, is an in-

surable one. Hence the right of agents, consignees and factors, to insure the goods of their principals.

Bell v. *Western Marine and Fire Insurance Company*, 423.

10. The acknowledgment of a debt by an agent, will stop prescription. C. C. 3486. *Greig* v. *Muggah*, 473.

11. One acting as an agent, may sue in his own name for the recovery of the amount of a draft drawn by himself, and accepted by the debtor of his principals. *Johnson* v. *Brashear*, 477.

AGREEMENTS BETWEEN PARTIES OR COUNSEL.

All agreements between parties or counsel, derogating from the rules of practice fixed by law, must be entered on the minutes of the court, or reduced to writing and filed in the record, or they will not be noticed.

Coffin v. *Pollard*, 124.

ALEATORY CONTRACTS.

A stake-holder who pays over the amount bet on a horse-race, without the sanction of a majority of the judges of the race, will be responsible to the winner. *Dauterive* v. *Broussard*, 516.

ANSWER.

See PLEADING, 19, 20, 21.

APPEAL.

1. The signature of the appellant is not necessary to an appeal bond; it is enough that it be signed by a sufficient surety. *Jones* v. *Sidle*, 59.

2. The 4th section of the act establishing the Commercial Court of New Orleans, so far as it attempts to authorize the Supreme Court to decide on cases in the first instance, and to determine matters not decided on in the inferior court, is unconstitutional. The Supreme Court cannot decide on the merits of a case which has not been acted on by the lower court.

Gove v. *Breedlove*, 78.

3. No appeal will lie from a claim for three hundred dollars, with interest, where the interest, being *ex mora*, began to run only from judicial demand. Const., art. 4, sect. 2. C. P. 91. *Pujol* v. *Correjolles*, 90.

4. Defendants had each obtained, separately, judgment for $100, with interest and costs, against the Bank of the United States, and had levied separate executions on different lots of ground. Plaintiffs having taken a rule on them, to show cause why they should not be restrained from all further proceedings for the reasons stated, the rule was made absolute, and defendants appealed. *Held*, that no appeal will lie, each judgment being for less than three hundred dollars. *United States* v. *Cochrane*, 120.

5. Where a cause has been tried by a jury, and no motion was made for a new trial, it must be an extreme case to induce the remanding of it.

Denton v. *Murdoch*, 127.

6. Where the record does not contain all the evidence adduced on the trial, and there is no statement of facts, bill of exceptions, nor assignment of errors, and the clerk of the lower court certifies that part of the documentary evidence, not included in the record, was not to be found among the papers, and there is no evidence to show that it has been since discovered, the appeal must be dismissed, as a *certiorari* would be useless.

Thayer v. *Littlefield*, 152.

7. A record certified by the clerk of the court from which an appeal has been taken, as "containing a transcript of all the proceedings, as well as of all the documents filed in the case," is insufficient, though nothing else appear to raise a doubt as to its completeness, where there is no statement of facts, bill of exceptions, or assignment of errors apparent on the record. Appellants must bring up a complete transcript of the record, with all the evidence upon which the case was tried, or show good cause why they have not done so. *Powell* v. *Williams*, 169.

8. Where an appellant relies upon errors apparent on the face of the record, they must be pointed out, in conformity to art. 897 of the Code of Practice.

Ib.

9. Plaintiffs having instituted suit on a note, a creditor of theirs had a *fi. fa.* levied on it, when it was agreed by the parties, that the note should be delivered to him. The note, while yet in the hands of the clerk, was attached by certain persons who had commenced an action against the seizing creditor. On a rule taken by the latter, the court ordered the note to be delivered to him, and from this judgment the attaching parties appealed. Pending the appeal, the action commenced by them against the seizing creditor, was decided against them: *Held*, that being thus without interest, the appeal must be dismissed. *Palmer* v. *Day*, 182.

10. One who appeals must bring before the Supreme Court all the parties, contradictorily with whom the judgment complained of was rendered, and who are interested in its remaining undisturbed.

Duggan v. *De Lizardi*, 224.

11. In actions on joint obligations, all the original parties must be sued together even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. (C. C. 2080 *et seq.*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees.

Ib.

12. In an action in the name of the State to recover the penalty of a bond taken for the appearance of one of the obligors, the defendants may urge, for the first time, after appeal, that nothing became due to the State by its forfeiture. *Per Curiam.* Such an objection is not based on the mere in-

capacity to sue, which must be specially denied, but, tending to show the absolute want of any legal right in the State, may be taken advantage of at any stage of a cause. It goes to show that the plaintiff has no interest in the subject matter of the suit, and that the right of action does not belong to the party who seeks to enforce it. *State* v. *Desforges*, 253.

13. Where an appeal has been applied for within the time prescribed by the Code of Practice, art. 593, it may be obtained even after that period, when the delay results from the necessity of applying to the Supreme Court, created by the refusal of the inferior Judge to allow the appeal.

Succession of Jacobs, 270.

14. Defendants in answer to an action on their promissory notes, alleged that they had entered into an agreement with the plaintiff, and their other creditors, by which a certain per cent on the amount of their debts was to be received as a full discharge thereof, averring a tender of that amount, and that they had been always ready to comply with the terms of the compromise, but that plaintiffs had since refused to accede thereto. Plaintiffs having moved for, and obtained a judgment for the per centage alleged to have been tendered, reserving their right to prosecute for the balance, and ordering the plaintiff to retain out of the per centage enough to defray the costs of the further proceedings should they result in favor of defendants, the latter, having been refused an appeal, moved for a mandamus to compel the allowance of one. *Held*, that defendants having admitted the debt to the amount for which judgment was rendered, and having averred a tender and their readiness to pay, cannot, under art. 567 of the Code of Practice, be allowed to appeal therefrom. *Skinner* v. *Dameron*, 447.

15. Where a bill of exceptions is not mentioned in the argument, nor otherwise insisted on before the Supreme Court, it will be considered as waived.

Murdock v. *Gurley—Application for Re-hearing*, 467.

16. A plea of release not made in the lower court, will not be listened to by the Supreme Court. This defence will be presumed to have been waived.

New Orleans Gas Light and Banking Company v. *Hudson*, 486.

ARBITRATION.

Where it is admitted, that an award was made without the arbitrators having been sworn, parol evidence of their proceedings is inadmissible.

Sharkey v. *Wood*, 326.

ASSIGNEE.

See BANKRUPTCY.

ASSIGNMENT.

An assignment of a claim, though gratuitous, followed by notice to the debtor, who had no offset at the time, is valid as to him. *Harrison* v. *Wilson*, 275.

ATTACHMENT.

1. Where in an action commenced by attachment against an absentee, the Sheriff's return on the attachment merely shows, that he attached all the property belonging to the defendant in the hands of the garnishee, and no interrogatories are propounded to, nor other proceedings had against the latter, but the suit is carried on contradictorily, with an attorney appointed by the court to represent the defendant, he will not be considered as in court and the suit will be dismissed. *Hoey* v. *Pepper*, 119.

2. Where property has been shipped to consignees entitled to a privilege thereon, so that the consignor or owner cannot take it out of their hands without paying their claims, a creditor of the owner cannot attach. *Lambeth* v. *Turnbull*, 268.

3. It is not necessary to support an attachment, that the bills of exchange on which the garnishees are liable, should be within this state, nor that the evidence of the debt should be seized. There is, in this respect, a wide difference between an attachment, and a seizure under execution. Any debt due by a resident to a non-resident, whether by note, acceptance of a bill, endorsement, or otherwise, will support an attachment. Payment by a garnishee under a judgment against him will protect him from any demand by his non-resident creditor. *Bean* v. *Mississippi Union Bank*, 333.

4. An attaching creditor can recover of the garnishee no more than his debtor, the creditor of the garnishee, could have recovered at the date of the attachment. *Ib.*

5. An exception by the garnishees, in a suit against a corporation existing in another State, filed after issue joined, that the plaintiffs did not make certain assignees or trustees of the corporation, under a deed of assignment, parties to the action, will be disregarded, where it does not appear that the plaintiffs were parties to the deed, nor that they, or the garnishees had notice of the assignment of the debt attached, previous to the institution of the suit, and neither the corporation, nor its assignees ask to be heard. *Ib.*

6. Where an attachment has been issued against a debt due by garnishees to a corporation existing in another State, the former cannot be discharged by paying or transacting with their creditors, after notice of the attachment. A garnishee is a kind of stake-holder. He cannot enter into the contest between the plaintiff and defendant, nor change his position towards either, after notice of the attachment. He is to render a true account, and can contest only as to the amount alleged to be due by him, contradictorily with both parties, and must pay to the party entitled thereto, the balance found to be due. Nor can he be released by a payment made by the drawers of the note on which he was indebted as endorser, if made after notice of the attachment. *Ib.*

7. Where, in an action against a Bank on its notes, plaintiffs attached a debt due to the Bank by persons who were made garnishees, the latter will be entitled to discharge their debt in notes of the Bank, only where they prove that they were in possession of them previous to the attachment. C. C. 2212. *Ib.*

8. It is not to be expected that a plaintiff can describe in his petition with great accuracy, the debts, or forms of the obligations between his debtor and the garnishees in an attachment suit. He has not, in many cases, the necessary information to enable him to do so. *Ib.*
9. The holder of a promissory note cannot proceed by attachment against an endorser, previous to maturity. The obligation of the endorser may never become absolute; the drawer may pay, or, in the event of his failure, the endorser be discharged by the omission of demand, protest, or notice.

Harrod v. *Burgess*, 449.

ATTORNEY AT LAW.

1. Extra compensation, promised to an attorney employed by the year, at a fixed salary, for the prosecution of certain suits, cannot be recovered before the decision of the suits, where the amount was not promised to be paid in advance. *State* v. *Atchafalaya Rail Road and Banking Co.*, 66.
2. Where it appears from the return of the Commissioner, that a witness whose deposition was taken by him, was cross-examined by a member of the bar, not the counsel of record of the party, it will be presumed that he had authority to appear, either from the client, or his counsel of record, unless his authority be denied on oath. *Kelly* v. *Benedict*, 138.
3. Where, after the resignation of his appointment, an attorney who had been employed at an annual salary, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful to them, he may recover compensation therefor.

Carter v. *Second Municipality of New Orleans*, 238.

ATTORNEY IN FACT.

See AGENCY.

BAIL.

By the passage of the act of 28th March, 1840, chap. 117, abolishing imprisonment for debt, bail not previously fixed with the debt, were discharged.

Jartroux v. *Debergue*, 126.

BANK.

The president and directors of a Bank have no authority, without the consent of the stockholders, to confess a forfeiture of the charter. But where, in their answer to an application on the part of the State for such forfeiture, they do not deny the grounds of forfeiture set forth in the petition, they must be taken to be true, and a forfeiture decreed accordingly.

State v. *Atchafalaya Rail Road and Banking Co.*, 63.

BANKRUPTCY.

1. The act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy suspended, if it did not abolish, all the laws of the different States relative to insolvent debtors, taking away the jurisdiction of their tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The State courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings. *Clarke* v. *Rosenda*, 27.
2. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Ib.*
3. Under the bankrupt act of 19th August, 1841, the District Courts of the United States, sitting in bankruptcy, are vested with all the powers necessary to effect a final settlement and liquidation of the affairs of the bankrupt. Sections 6, 8. *Conrad* v. *Prieur*, 49.
4. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Ib.*
5. There are essential differences between the bankrupt law of England and of this country. The former is exclusively a forced proceeding; the bankrupt is not required, as here, to make a surrender of all his property for the benefit of all his creditors; a creditor may take no part in the bankrupt proceedings, but retain his remedy in the courts of law. Here, by the law itself, every creditor is made a party to the bankruptcy, all are cited, and an issue is joined between them and the bankrupt, who, in consideration of his surrender, sues for a discharge. *Ib.*
6. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*

7. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessary to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Ib.*

8. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages. *Ib.*

9. The assignee of a bankrupt, under the act of 19th August, 1841, who claims the interest of the latter in a suit, may file a third opposition, for the purpose of asserting the rights of the creditors whom he represents. C. P. 396.

Vidal v. *Ocean Insurance Company*, 68.

10. No action whatever, executory or ordinary, can be maintained against a bankrupt, regularly discharged under the act of Congress of 19th August, 1841, for a debt contracted previous to his bankruptcy, where the plaintiff was placed on the list of creditors filed in compliance with the act. The action must be against the assignee.

City Bank of New Orleans v. *Walton*, 158.

11. The State tribunals were not deprived, by the bankrupt law of 19th August, 1841, of any portion of their jurisdiction, necessary to the final administration of the estates of insolvents who had made a surrender of their property previous to its passage. A State court, in which a surrender was made, has authority to decide, between the syndic of the creditors under the cession in the State court, and an assignee subsequently appointed by the United States Court under the bankrupt act, the right to property alleged to have been ceded under the State law, but afterwards placed on the schedule of the debtor, on his application to be declared a bankrupt.

West v. *His Creditors*, 261.

12. A judgment rendered in a State court against a party declared a bankrupt under the act of Congress of 1841, and to whom an assignee had been appointed, without such assignee having been made a party, is a nullity.

Harrod v. *Burgess*, 449.

13. The assignee of a bankrupt under the act of Congress, of 19th August, 1841, may come into the State courts, for the purpose of protecting the interests confided to him. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The holder of a bill of exchange, is under no obligation to use active diligence in suing an acceptor, or any other party. He may remain passive, and forbear to sue as long as he pleases; but he must not agree to give time to an acceptor, so as to preclude himself from suing, and thus suspend his remedy against the latter, to the prejudice of the drawer and endorsers. To make an agreement for indulgence obligatory, it must be for an adequate consideration. A delay, without sufficient consideration, and without taking any new security, being *nudum pactum*, will not discharge the other parties. Nor will they be discharged where the agreement, though obligatory, was made with their consent. *Frazier* v. *Dick*, 249.
2. Where, after the last day of grace, the drawer of a bill promises the holder to pay it, if he will not present it, and the latter subsequently presents and protests it, the former will be released from any obligation arising from his conditional promise. *Keith* v. *Mackey*, 277.
3. After the last day of grace, the funds in the hands of the drawee are at the risk of the holder. *Ib.*
4. Though the drawer of a bill may be discharged from his obligation to pay it, by the neglect of the holder to have it presented at the place of payment, and protested, and to have notice given thereof, on the ground of the damage he is presumed to have sustained by the *laches* of the latter, yet, if he afterwards withdraws from the hands of the drawee the funds on which he had drawn, he will be responsible, under art. 2294 of the Civil Code, to the holder, who had become the owner thereof, for the amount. *Ib.*
5. It is not necessary to support an attachment, that the bills of exchange on which the garnishees are liable, should be within this State, nor that the evidence of the debt should be seized. There is, in this respect, a wide difference between an attachment, and a seizure under execution. Any debt due by a resident to a non-resident, whether by note, acceptance of a bill, endorsement, or otherwise, will support an attachment. Payment by a garnishee under a judgment against him, will protect him from any demand by his non-resident creditor. *Bean* v. *Mississippi Union Bank*, 333.
6. A garnishee cannot be released by a payment made by the drawers of the note on which he was indebted as endorser, if made after notice of the attachment. *Ib.*
7. Legal subrogation results from the payment of a bill of exchange, or promissory note, by an endorser, though made before maturity. The endorser is included in the third paragraph of art. 2157 of the Civil Code, he being bound with, or for the maker or acceptor, and the article referring to all obligations whatever, whether absolute or conditional.

   Wiggin v. *Flower*, 406.
8. Though the obligation of an endorser or surety cannot be enforced till after the event on which it becomes absolute, it exists from the time when it was contracted, for it is susceptible of being compromised, released or transferred, and of passing to heirs, &c. So the rights of the endorser, or surety,

against the maker or principal, exist before the obligation of the former becomes absolute. *Ib.*

9. Endorsers and sureties are, under the Civil Code, conditional obligors of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. Though no conservatory acts can be exercised against the conditional debtor by endorsement, until his obligation becomes absolute, both the endorser and the surety, may, under art. 2037 of the Civil Code perform all acts conservatory of their respective rights, even before their own obligations have become absolute. *Ib.*

10. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Ib.*

11. Plaintiffs accepted a bill payable at a future period, which was endorsed by the payee to third persons, by whom it was endorsed to a bank, which discounted the bill in their favor. The latter having paid the bill, before maturity, in notes of the bank, which were under par, claimed the whole amount of the bill from the acceptors. *Held*, that the plaintiffs did not, by the endorsement and discount of the bill, and the subsequent depreciation of the notes of the bank, acquire *ipsis factis*, any more than an inchoate and incomplete right to pay in such depreciated notes, not being parties to any act or contract from which such a right might result; that not having manifested any intention to avail themselves of the advantage which the depreciation of the bank notes offered, until, by the payment of the bill, the endorsers had acquired the rights of the bank thereto, plaintiffs were in the same situation in which they would have been, had the bank transferred the note at any time after its discount; and that, by their acceptance, plaintiffs bound themselves to pay to the order of the payee, the whole amount of the bill, that the endorsers became entitled thereto by the transfer of the bill, that the bank acquired their rights by the discount, and that, the endorsers, by the payment of the bill, acquired a legal subrogation to the rights of the bank. *Ib.*

12. Ordinary endorsers are not placed on the same footing as sureties; nor can they, like the latter, claim the benefit of discussion. *Ib.*

13. Proof of written notice to the endorser of a note of its non-payment by the makers, and of protest, is necessary to a recovery against him. *McKee* v. *Dubois*, 421.

14. The holder of a promissory note cannot proceed by attachment against an endorser, previous to maturity. The obligation of the endorser may never become absolute; the drawer may pay, or, in the event of his failure, the endorser be discharged by the omission of demand, protest, or notice. *Harrod* v. *Burgess*, 449.

15. Where a debtor has made a *cessio bonorum*, all his debts, whether payable

then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Légér* v. *Arcenaux*, 513.

CARRIERS.

1. To recover of the owners of a steamer, as common carriers, the value of property lost or destroyed by them, it is sufficient to allege that the defendants undertook as carriers to convey the property for hire, and failed to do so. Any specification of the acts, or neglect which occasioned the loss may be regarded as surplusage, and can furnish no ground for excepting to the petition as uniting distinct causes of action—a cause *ex contractu*, with one *ex delicto*. *Key* v. *Benedict*, 138.
2. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned by want of care or skill in those in charge of the boat. *Ib.*
3. The owner of a steamer, as a common carrier, is responsible for property received on his boat, and lost by his fault. *Clines* v. *Frisbee*, 192.
4. Interest is due, from judicial demand, on an amount recovered as damages for property lost by a common carrier. The sum claimed arises out of a contract, though the amount due was unliquidated. *Ib.*

CITATION.

1. Where in an action commenced by attachment against an absentee, the Sheriff's return on the attachment merely shows, that he attached all the property belonging to the defendant in the hands of the garnishee, and no interrogatories are propounded to, nor other proceedings had against the latter, but the suit is carried on contradictorily, with an attorney appointed by the court to represent the defendant, he will not be considered as in court, and the suit will be dismissed. *Hoey* v. *Pepper*, 119.
2. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *McNairy* v. *Bell*, 418.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of* 1808.
II. *Civil Code.*
III. *Code of Practice.*

I. *Civil Code of* 1808.

Book III, Tit. I. arts. 43, 49, 51. Irregular successions. *Layre* v. *Pasco*, 9.
——— Tit. V. arts. 63 to 85. Community of gains. *Norès* v. *Carraby*, 292.

II. *Civil Code.*

184 to 190. Emancipation of slaves. *Mathews* v. *Boland*, 200.
477. Vacant successions. *Layre* v. *Pasco*, 9.
763, 764. Servitudes. *Barton* v. *Kirkman*, 16.
911, 917, 923. Irregular successions. *Layre* v. *Pasco*, 9.
982. Acceptance of successions. *Greig* v. *Muggah*, 473.
1163. Successions—sale of effects. *Succession of Porter*, 96.
1370, *et seq.* Actions against successions. *Duggan* v. *De Lizardi*, 224.
1375, 1376. Obligation of heirs. *Greig* v. *Muggah*, 473.
1468. Donations between parties living in concubinage. *Layre* v. *Pasco*, 9.
1571. Dispositions *mortis causa*. *Succession of Pough*, 503.
1575. ———. *Succession of Key*, 482.
1663. Sale of effects of successions. *Succession of Porter*, 96.
1775. Contracts. *Dugat* v. *Comeau*, 475.
1811. ——— *Beach* v. *McDonough*, 352.
1841. ——— *Lobdell* v. *Burke*, 93.
1844. ——— *Mitchell* v. *Cooley*, 240.
1887, 1889 ——— *Slidell* v. *Pritchard*, 101.
1890. ——— *Dickerson* v. *Gordy*, 489. *Dugat* v. *Comeau*, 475.
1906, 1907. ——— *Sewell* v. *Willcox*, 83.
1928. ——— *Kernan* v. *Chamberlin*, 116.
1934. Compound interest. *Mayor &c. of New Orleans* v. *Commercial Bank of New Orleans*, 234.
1940. Contracts. *Knox* v. *Liddell*, 111.
1979. ——— *Prats* v. *His Creditors*, 288.
2037, 2038. ——— *Wiggin* v. *Flower*, 406.
2073, 2075, 2079. ———*Erwin* v. *Greene*, 70.
2080. ——— *Ib. Duggan* v. *De Lizardi*, 224. *Cleary* v. *Second Municipality of New Orleans*, 247.
2081. ——— *Duggan* v. *De Lizardi*, 224. *Cleary* v. *Second Municipality of New Orleans*, 247.
2082. ——— *Erwin* v. *Greene*, 70. *Duggan* v. *De Lizardi*, 224.
2088. ——— *Erwin* v. *Greene*, 70.
2112. Obligations of heirs. *Greig* v. *Muggah*, 473.
2130. Contracts. *Wiggin* v. *Flower*, 406.
2145. Payment to prejudice of seizure or attachment. *Bean* v. *Mississippi Union Bank*, 333.
2156. Subrogation. *Harrison* v. *Bisland*, 204.
2157. ——— *Ib. Powell* v. *Kellar*, 272. *Wiggan* v. *Flower*, 406.
2212. Compensation. *Bean* v. *Mississippi Union Bank*, 333.
2232. Authentic acts. *Dugat* v. *Comeau*, 475.
2252. Contracts. *Marigny* v. *Union Bank of Louisiana*, 354.

2256. Contracts evidence of. *Knox* v. *Liddell*, 111.
2257. ——— *Derbes* v *Décuir*, 491.
2281, 2282. Quasi-contracts. *Slidell* v. *Pritchard*, 101.
2288. ——— *Powell* v. *Kellar*, 272.
2294. Offences and quasi-offences. *Gove* v. *Breedlove*, 70. *Kernan* v. *Chamberlin*, 116. *Keith* v. *Mackey*, 277.
2295. ——— *Gove* v. *Breedlove*, 70. *Kernan* v. *Chamberlin*, 116.
2296, 2297, 2298. ———*Gove* v. *Breedlove*, 70.
2299. ——— *Ib.* *Winston* v. *Foster*, 113. *Kelly* v. *Benedict*, 138.
2300 to 2304. ——— *Gove* v. *Breedlove*, 711.
2355. Wife's mortgage and privilege. *Vanhille* v. *Her Husband*, 496.
2373. Community of gains. *Caldwell* v. *Hennen*, 20.
2456. Sale. *Bell* v. *Dowly*, 18.
2472. ——— *Sewell* v. *Willcox*, 83.
2474. Prescription. *Ib.*
2480, 2481, 2482. Sale. *Jeannin* v. *Millaudon*, 76.
2508. ——— *Fox* v. *Walsh*, 222.
2675, 2676. Lease. *Penn* v. *Collins*, 213. *Beach* v. *M'Donough*, 352.
2677, 2679. ——— *Penn* v. *Collins*, 213.
2816, 2818, 2819. Partnership *in commendam*. *Lachomette* v. *Thomas*, 172.
2952, 2953. Aleatory contracts. *Slidell* v. *Pritchard*, 101.
3008. Surety. *Erwin* v. *Greene*, 70.
3030. ——— *Penn* v. *Collins*, 213.
3038, 3040. Compromise. *Hodge* v. *Leeds*, 322.
3158, 3182, Privilege. *Vanhille* v. *Her Husband*, 496.
3204, § 8. ——— *Bell* v. *Western Marine and Fire Insurance Co.* 423.
3213. ——— *Hairy* v. *Dennistoun*, 130.
3245. Mortgages. *Conrad* v. *Prieur*, 49. *Vanhille* v. *Her Husband*, 496.
3246, 3247, 3248. Mortgages. *Conrad* v. *Prieur*, 49.
3249. ——— *Ib.* *Erwin* v. *Greene*, 70. *Vanhille* v. *Her Husband*, 496.
3250. ——— *Conrad* v. *Prieur*, 49.
3251, 3252. ——— *Ib.* *Erwin* v. *Greene*, 70.
3253 to 3271. ——— *Conrad* v. *Prieur*, 49.
3272 ——— *Ib.* *Dugat* v. *Comeau*, 475.
3273 to 3286. *Conrad* v. *Prieur*, 49.
3287. ——— *Ib.* *Vanhille* v. *Her Husband*, 496.
3288 to 3322. ——— *Conrad* v. *Prieur*, 49.
3323. ——— *Ib.* *Prats* v. *His Creditors*, 288.
3324. ——— *Conrad* v. *Prieur*, 49.
3325, 3326. ——— *Ib.* *Prats* v. *His Creditors*, 288.
3327. ——— *Conrad* v. *Prieur*, 49.
3328. ——— *Ib.* *Succession of Dough*, 50.
3329 to 3374. ——— *Conrad* v. *Prieur*, 49.
3391, 3393. Possession. *Barnes* v. *Gaines*, 314.
3486. Prescription. *Greig* v. *Muggah*, 473.
3507. ——— *Sewell* v. *Willcox*, 83.

3522 § 23. Definition of law terms. Notice. *Hallock* v. *Caruthers*, 190. *McKee* v. *Dubois*, 421.

III. *Code of Practice.*

35. Equitable action. *Mitchell* v. *Cooley*, 240.
43, 49. Petitory action. *Barnes* v. *Gaines*, 314.
91. Jurisdiction. *Pujol* v. *Correjolles*, 90.
113. Actions by heirs. *Greig* v. *Muggah*, 473.
120. Actions against heirs. *Duggan* v. *De Lizardi*, 224. *Greig* v. *Muggah*, 473.
285, 288. Tutorship. *Tutorship of Labarre*, 268.
313. Judgment by default. *Guillotte* v. *Thompson*, 141.
322. Tutorship. *Tutorship of Labarre*, 268.
349. Interrogatories to a party. *Dickerson* v. *Gordy*, 489.
351. ——— *Derbes* v. *Décuir*, 491.
377. Reconvention. *Bayne* v. *Fox*, 2.
385. Warranty. *Jeannin* v. *Millaudon*, 76.
396. Opposition of third persons. *Vidal* v. *Ocean Insurance Company*, 68. *Beach* v. *M'Donough*, 352. *Vanhille* v. *Her Husband*, 496.
397, 398. ——— *Beach* v. *M'Donough*, 352.
399. ——— *Vidal* v. *Ocean Insurance Company*, 68.
401, 403. ——— *Vanhille* v. *Her Husband*, 496.
424, 425. Commission to take testimony. *Denton* v. *Murdock*, 127.
426, 428. ——— *Hallock* v. *Caruthers*, 190.
515, 516. Trial by Jury. *Gove* v. *Breedlove*, 78.
517. ——— *Penn* v. *Collins*, 213.
519, 521, 524, 528. ——— *Gove* v. *Breedlove*, 78.
536. Nonsuit. *Buchanan* v. *Locke*, 211.
567. Appeal. *Skinner* v. *Dameron*, 447.
569. ——— *Bouquevalle* v. *Young*, 162.
593. ——— *Succession of Jacobs*, 270.
606, 616. Rescission of judgments. *Darse* v. *Leaumont*, 284.
678, 679, 683, 685, 704, 706, 707. Sale under *Fi. Fa.* *Powell* v. *Kellar*, 272.
708. ——— *Ib.* *Dimitry* v. *Pollock*, 347.
710. ——— *Powell* v. *Kellar*, 272. *Vanhille* v. *Her Husband*, 496.
711. ——— *Cleary* v. *Second Municipality of New Orleans*, 247.
713. ——— *Powell* v. *Kellar*, 272. *Vanhille* v. *Her Husband*, 496.
714, 715. ——— *Vanhille* v. *Her Husband*, 496.
732, 733, 739. Executory process. *Clarke* v. *Rosenda*, 27.
766, 767. Duties of Sheriff, and remedies against. *Dussin* v. *Delaroderie*, 202.
845. 846, 853. Prohibition. *Clarke* v. *Rosenda*, 27.
877. Powers of courts. *Jones* v. *Sidle*, 59.
897. Appeal—errors of law. *Powell* v. *Williams*, 169.
898. ——— Certiorari. *Thayer* v. *Littlefield*, 153.

902. Appeal, plea of prescription. *Sewell* v. *Willcox*, 83.
924. Courts of probate. *Bayne* v. *Fox*, 2.
983. Successions. *Barnes* v. *Gaines*, 314.
984. ——— *Succession of Jacobs*, 270.
986. ——— *Succession of Porter*, 96. *Succession of Jacobs*, 270.
987, 990, 991, 992, 995. ——— *Succession of Porter*, 96.
1034, 1035. Proceedings in courts of Probate. *Ib.*

COMMERCIAL BANK OF NEW ORLEANS.

1. The thirty-seventh section of the Act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, which exempts its capital from the payment of any tax imposed by the State, or any parish, or body politic under its authority, does not exempt from such taxation, slaves, or other real property held by the bank. Nothing is exempted but the three millions of dollars furnished by the stockholders for its operations. *Second Municipality of Orleans* v. *The Commercial Bank of New Orleans*, 151.
2. The interest of five per cent. per annum, allowed to the City of New Orleans by section 23 of the act of 1st April, 1833, incorporating the Commercial Bank of New Orleans, is to be calculated on the surplus of the semi-annual dividends on the stock subscribed for by the City, remaining after the payment of the interest on the bonds given to the Bank by the City, and directed to be set apart as a sinking fund. It was not intended, that interest should be calculated on such surplus every six months, and be added thereto, so as to form new capital, bearing like interest. The Legislature did not intend to allow compound interest. *Mayor &c. of New Orleans* v. *Commercial Bank of New Orleans*, 234.

COMPENSATION.

1. An assignment of a claim, though gratuitous, followed by notice to the debtor, who had no offset at the time, is valid as to him. *Harrison* v. *Wilson*, 275.
2. Where, in an action against a Bank on its notes, plaintiffs attached a debt due to the Bank by persons who were made garnishees, the latter will be entitled to discharge their debt in notes of the Bank, only where they prove that they were in possession of them previous to the attachment. C. C. 2212. *Bean* v. *Mississippi Union Bank*, 333.

CONFESSION OF JUDGMENT.

1. No particular form is necessary to a confession of judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a part of the sum claimed, it is a confession *pro tanto*; and there is no reason why the creditor should be delayed in the collection thereof, until a decision be had on the disputed portion. *Skinner* v. *Dameron*, 447.

CONSTITUTION OF THE STATE.

1. The rules which govern in the construction of a statute, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation. *Nicholson* v. *Thompson*, 367.

Art. 4, sect. 2. Supreme Court. *Pujol* v. *Correjolles*, 90.

——, —— 5. Removal of Judges. *Nicholson* v. *Thompson*, 367.

——, —— 10. ——————clerks. *Ib.*

——, —— 11. Continuance of existing laws in force. *Ib.*

—— 5, sect. 3. Impeachment. *Ib.*

—— 6, —— 8. Duration of Officers, &c. *Ib.*

Shedule, sect. 4. Continuance of existing laws in force. *Ib.*

CONTRACTS.

I. *Consent necessary to Form, and confirmation.*

II. *Joint contracts.*

III. *Illegal contracts.*

IV. *Proof.*

V. *Interpretation.*

VI. *Putting in default.*

VII. *Damages for non-performance.*

VIII. *Extinction.*

I. *Consent necessary to Form, and confirmation.*

1. No obligation or right can result to any one from an act or contract, to which he was not a party, until he manifests his intention to avail himself of such right. *Wiggin* v. *Flower*, 406.

2. Where a contract is made for another, subject to his ratification, he will be presumed to have ratified it, unless, on being informed thereof, he immediately repudiates it. *Lartigue* v. *Peet*, 91.

3. The voluntary execution of a contract, with the full knowledge of the grounds upon which it might be rescinded, amounts to a ratification of it, and involves a renunciation of the means and exceptions that might have been opposed to it. *Marigny* v. *Union Bank of Louisiana*, 354.

II. *Joint contracts.*

4. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 120. C. C. 1370, *et seq*; *aliter* as to co-obligors by joint contract, all of whom must be sued together. C. C. 2080 *et seq*. In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan* v. *De Lizardi*, 224.

5. In actions on joint obligations, all the original parties must be sued together, even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs, (C. C. 2080 *et seq*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees. *Ib.*

III. *Illegal contracts.*

6. An obligation with an unlawful cause, can have no effect. The cause is unlawful when forbidden by law, *contra bonos mores*, or contrary to public order. C. C. 1887, 1889. *Slidell* v. *Pritchard*, 101.

7. Any contract or agreement between an insolvent and one of his creditors, the effect of which is to secure to the latter an undue preference over the other creditors, or to procure for him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. It matters not as to the nature of the opposition, if its withdrawal be the consideration or cause for which the preference is given. Thus, an agreement in consideration of the withdrawal of an opposition to the sufficiency of the security offered by an insolvent, who had been appointed syndic of his own creditors, though the opposition was made after the insolvent had obtained his discharge, of the benefit of which he could not be deprived by any subsequent opposition, is illegal and void. It is sufficient that an undue advantage is derived from it by one of the creditors. The object of the law is, that the rights of all the creditors should remain in the state they were in, at the time of the insolvency; that no change should take place so as to favor any; and that the effects surrendered, and the property subsequently acquired, should be equally divided between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims at the time of the surrender, or of the contracting of the subsequent debts. *Ib.*

8. Money paid to a creditor, in pursuance of an illegal agreement with an insolvent, who has been appointed the syndic of his own creditors, to secure the payment of the creditor's claim, in consideration of his withdrawing an opposition to the sufficiency of the security offered by the syndic, cannot be recovered back, either by the debtor, or by an assignee of his property, under a bankrupt law, suing for the benefit of the creditors, or by a security, who may have paid the amount so reclaimed. Though the cause of the agreement was unlawful, it originated in a natural obligation, on which no action could be founded, but which sufficed to prevent the recovery of the money back, when once paid. C. C. 2281, 2282. *Ib.*

9. No action will lie on a contract the consideration of which is prohibited by law, or which originated in the violation of any statute. C. C. 1887, 1889. *Dickerson* v. *Gordy*, 490.

IV. *Proof.*

10. Solidarity must be stipulated expressly. It cannot be presumed. C. C. 2088. So of surety-ship. Ib. 3008. *Erwin* v. *Greene*, 70.

11. The provision of art. 2256 of the Civil Code, that "parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since," is not confined to acts relative to the transfer of immoveable property or slaves, nor to authentic acts. *Knox* v. *Liddell*, 111.

12. The owner of a building will be responsible for extra work done on it, though it be not proved that he ordered it, where it is shown, that he was at the building daily and must have seen it, and did not forbid it. If he did not want the work done, he should have prevented its execution. *Percy* v. *Peyroux*, 179.

13. Parol evidence is inadmissible to prove the cancelling of written contracts. Such evidence is inadmissible against a written contract; and proof that it was cancelled, is the strongest evidence that can be given against it. *Sharkey* v. *Wood*, 326.

14. A clear case of error, or want of consideration must be shown, to release one from an obligation who has, under his signature, acknowledged his indebtedness, and admitted a consideration. *Dugat* v. *Comeau*, 475.

15. The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to prove a contract, not reduced to writing to pay a sum of money where the amount exceeds five hundred dollars. C. C. 2257. *Derbes* v. *Décuir*, 491.

V. *Interpretation.*

16. Doubts as to the construction of a contract cannot avail one, who, not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Mitchell* v. *Cooley*, 240.

VI. *Putting in Default.*

17. Offers to perform one's part of a contract are, according to the jurisprudence of France, either *labial* or *real*. The latter correspond to our *tender*, which, when followed by a consignment, amounts to payment. An offer may be made without a tender. *Sewell* v. *Willcox—Rehearing*, 87.

18. An *offer* by the plaintiff to perform his part of the obligation, is an indispensable preliminary to an action for the rescission of a commutative contract. *Ib.*

VII. *Damages for Non-Performance.*

19. A contractor who fails to complete a building within the time specified, will be responsible to the owner for the damage sustained by his failure to comply with his contract. *Percy* v. *Peyroux*, 179.

VIII. *Extinction.*

20. In general, where joint obligors or creditors unite in a common acquit-

tance, each will be presumed to have received his share, according to the contract. Each stipulates only for himself. *Marty* v. *His Creditors*, 193.

21. In art. 2130 of the Civil Code, the word *co-obligee*, by an error of the press, is used for *co-obligor*. *Wiggin* v. *Flower*, 406.

22. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Ib.*

See ALEATORY CONTRACTS.

COSTS.

See CONTRACTS, 5.

COURTS.

I. *Courts Generally.*
II. *Supreme Court.*
III. *District and Probate Courts.*
IV. *Commercial Court of New Orleans.*
V. *Courts of the United States in Louisiana.*

I. *Courts Generally.*

1. The judicial department does not pretend to the power of supervising the proceedings or acts, of the other co-ordinate branches of the government; it decides only on the rights of parties in controversies which have assumed a judicial form. When the right of a citizen to enjoy the emoluments of a particular office, is contested by another pretending to have a better right under the constitution and laws, it necessarily appertains to the judiciary to decide between them, according to the supreme law.

Nicholson v. *Thompson*, 367.

2. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *McNairy* v. *Bell*, 418.

II. *Supreme Court.*

3. The powers conferred on the Supreme Court, enable it to supervise the legal opinions and judgments of the inferior Judges. They do not extend to the correction of any intemperate language in which they may be expressed, or to the personal deportment of the Judges, while presiding in their respective courts. *Gove* v. *Breedlove*, 78.

4. The 4th section of the act establishing the Commercial Court of New Orleans, so far as it attempts to authorize the Supreme Court to decide on cases in the first instance, and to determine matters not decided on in the inferior court, is unconstitutional. The Supreme Court cannot decide on the merits of a case which has not been acted on by the lower court.

Gove v. *Breedlove*, 75.

5. The Supreme Court, as the guardian of the constitutional rights of the people, is authorized to pronounce on the constitutionality of the acts of the two other departments of the government; but no act of either will be pronounced unconstitutional unless manifestly so, and the incompatibility with the Constitution must be evident.

Nicholson v. *Thompson—Application for Re-hearing*, 383.

III. *District and Probate Courts.*

6. As a general rule, Courts of Probate have exclusive jurisdiction of all claims for money against successions, administered by executors, curators, &c. (C. P. art. 924, § 13); and when a defendant dies during the pendency of a suit against him for a sum of money, the jurisdiction of the ordinary tribunals ceases, and the case must be transferred to the Probate Court of the parish where the succession is opened, to be there proceeded in. The object of the law is to bring before the Probate Court all the claims which, being subject to classification, are to be paid by the administrators under the control and supervision of that court. But the law does not extend to cases where the claim against the succession is set up by reconvention or compensation, or in which the parties have instituted separate actions against each other, which have been subsequently consolidated. In such cases, the jurisdiction of the ordinary tribunals will be maintained, where the original action was within their jurisdiction. The actions are indivisible, and must be tried together in the same court.

Bayne v. *Fox*, 2.

7. Where a party has been put in possession of a succession, as testamentary heir, by a decree of the Court of Probates, that court is divested of all control over the estate; and one who claims the property as the heir at law of the deceased, must proceed before the courts of ordinary jurisdiction. Nor is it requisite, before instituting such revendicatory action, that the claimant should be recognized as heir by the Probate Court; this is only required while the succession continues under the supervision of the court by which the executor, administrator, or curator was appointed. *Layre* v. *Pasco*, 9.

8. Where a Judge of Probates has rendered a judgment refusing to homologate the proceedings of a family meeting, he cannot be compelled by *mandamus* to do so. *State* v. *Judge of Probates of Jefferson*, 161.

9. Plaintiff having recovered damages in an action for a malicious prosecution tried by a jury before a Parish Court, defendant appealed to the District Court, which confirmed the judgment. There was no prayer for a trial by jury before the District Court; but defendant moved for a new trial in that court, on the ground, that the case could not be tried by it without a

jury. The new trial was refused, and the defendant again appealed. *Per Curiam.* It was too late to ask for a jury on a motion for a new trial; and it may well be doubted whether a trial by jury can be required in the District Court, sitting for the trial of appeals. *Bouquevalte* v. *Young*, 162.

10. Under arts. 608 and 616, of the Code of Practice, a Court of Probates has jurisdiction to annul, or rescind decrees or judgments rendered by itself, though the controversy involve the ownership of immoveable property. *Darse* v. *Leaumont*, 284.

11. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983. *Barnes* v. *Gaines*, 314.

IV. *Commercial Court of New Orleans.*

12. An action to recover a drawback due on certain articles subject to an import duty, and for the value of merchandize detained from the plaintiff, is not an action for the recovery of damages for an offence or quasi-offence, in the meaning of the third section of the act of 14th March, 1839, ch. 17, establishing the Commercial Court of New Orleans: but is within the jurisdiction of that court. C. C. 2294 to 2304. *Gove* v. *Breedove*, 75.

V. *Courts of the United States in Louisiana.*

13. A District Court of the United States has no power to revise any decision rendered by a State court. *Harrod* v. *Burgess*, 449.

14. A judgment having been obtained by the United States in a District Court of the United States, against plaintiffs' testator in his lifetime, an execution was issued after his death, without any steps having been taken to revive the suit, under which property was sold by the Marshal, and purchased by defendant. In an action before a State court, by the representatives of the deceased against the purchaser, for the property: *Held*, that the act of Congress of 26th May, 1824, regulating the mode of practice in the Courts of the United States in Louisiana, having provided that it shall be conformable to the laws directing the mode of practice in the District Courts of the State, the United States had no right to execute their judgment without having instituted proceedings to revive it; and that the State court had jurisdiction to look into the proceedings of the executive officer subsequent to the judgment, to ascertain between citizens of the State, what rights had been taken from the one and given to the other. Judgment for the plaintiffs. *Garrard v. Reed*, 506.

See BANKRUPTCY, 1, 3, 11.

DAMAGES.

Damages cannot be assessed without the intervention of a jury. Art. 313, of the Code of Practice, which requires, when damages are to be assessed in confirming a judgment by default, that a jury shall be summoned to find them, as if the defendant had answered, and that the judgment shall be in

conformity with their verdict, is not repealed by the 17th section of the act of 10 February, 1841, chap. 16, which provides, that the prayer for a trial by jury, in any case before the District, Parish, or Commercial Courts of New Orleans, shall be disregarded, and the case tried by the Court, unless the party shall have advanced the compensation allowed to the jurors, in those courts, on filing his petition or answer praying for such trial.
Guillotte v. *Thompson*, 141.

DISCUSSION.

See SURETY, 9.

DISPOSITIONS MORTIS CAUSA.

1. A wife has no power to alienate any part of the real or personal estate of the community, or to throw any obstacle in the way of its disposition by the husband, during the existence of the community. But she may dispose of her private estate, and consequently of that portion of the community property, which, after her death and the settlement of the community, may become part of her estate. *Preston* v. *Humphreys*, 299.
2. Where subsequently to the date of a will by which the wife bequeathed all her interest in certain community property, but before the dissolution of the community by the death of the wife, the husband sells the property to the devisee, there is an end of the devise, which is ambulatory, and without effect until the death of the testatrix. Had there been no sale, the devisee might, after the settlement of the community, have claimed the interest under her will. *Ib.*
3. The legatees of the husband or wife, have no claim against the community until all its debts are paid. *Ib.*
4. Clauses in a will limiting the testatrix's power to dispose of the legacies after their reversion to herself, are nugatory, and do not amount to a substitution. *Barnes* v. *Gaines*, 314.
5. Where a testatrix directed by her will "that in case any of the legatees should die before her, the share of the deceased legatee shall go to his children, their heirs or assigns," and this direction was not changed by her, after the death of the legatee: *Held*, that this clause does not contain a substitution; that the death of either of the legatees before the testatrix, could not prevent her from disposing of her property as she pleased in favor of any other persons; and that the right of the legatee, first instituted, not having accrued, the children, the eventual legatees, would take under the will, without reference to the previous intention. *Ib.*
6. Neither the validity of a will under which a plaintiff holds the appointment of testamentary executor, nor the certificate of his appointment from the Court of Probates, can be inquired into collaterally, in a controversy between the executor and a debtor of the succession represented by him. The court cannot look beyond the certificate of his appointment, or letters testamentary; and until the will be regularly annulled, which cannot be done in

the absence of those having an interest under it, he will be entitled to exercise the powers conferred on him by law.

Maskell v. *Roussell*, 500.

7. In an instrument signed by the deceased and another, offered for probate as a nuncupative will by public act, the notary, after stating that the act was executed by him as dictated by the testator, in the presence of the witnesses required by law, added: "The parties dispense with the certificate required by art. 3328 of the Civil Code, and exonerate me, said notary, from all liability on account of the non-production of the same. All of which was done without interruption, and without turning aside to other acts." &c. *Held*, that the instrument is invalid as a nuncupative will by public act; that the stipulation relative to exonerating the officer from all liability in consequence of not producing the certificate required by law, is a matter *inter vivos*, foreign to dispositions *mortis causa*, having nothing to do with the formalities of the will; and that its introduction was *a turning aside to another act*, and an *interruption* of the formalities, which, were consequently not fulfilled *at one time*, as required by art. 1571 of the Civil Code.

Succession of Dough, 503.

DOMICIL.

The master and owner of a steamer plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, must be sued in the parish proved by witnesses to be that of his domicil; and this, though he may have declared, in the enrolment of his boat, taken out before the inception of the suit, that his usual place of residence is in the place where the action was brought. *Ricard* v. *Kimball*, 142.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

EMANCIPATION OF SLAVES.

1. Manumission cannot be proved by parol. *Rosiné* v. *Bonnabel*, 163.

2. A slave who produces a receipt from his master, for a sum in full for his freedom, will not be entitled to an unconditional decree therefor; the judgment must be one ordering the defendant to emancipate him in the manner pointed out by law, unless some legal obstacle be shown to exist, connected with the conduct or character of the slave. C. C. 184, *et seq.* Acts 9th March, 1807; 31st January, 1827; 24th March, 1827; 16th March, 1830; 25th March, 1831. *Mathews* v. *Boland*, 200.

3. The assent of a Police Jury to the emancipation of a slave, is not an ordinance requiring the signatures of the President and Clerk on the journal to give it validity, in the meaning of the seventh section of the act of 20th March, 1816, relative to the organization and powers of Police Juries.

Fanchonette v. *Grangé*, 510.

4. The assent of a Police Jury is only necessary to the emancipation of a slave, when under thirty years of age. Act 31st January, 1827. Such assent when the slave is thirty years of age, is only necessary to relieve the master from giving bond to remove the slave so emancipated out of the State within one month. Acts of 16th March, 1830, and 25th March, 1831. *Ib.*

EVIDENCE.

I. *Matters Judicially noticed.*
II. *Competency of Witness.*
III. *Examination of Witness.*
IV. *Commission to take Testimony.*
V. *Judicial Records and Proceedings.*
VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
VII. *Private Writings.*
VIII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in value.*
IX. *Admissibility of Parol Evidence to explain or contradict Written Instruments.*
X. *Secondary Evidence.*
XI. *Onus Probandi.*
XII. *Presumption.*
XIII. *Admissibility of Evidence under the Pleadings.*
XIV. *Evidence of Parties.*
XV. *Evidence in Particular Actions.*
1. *Against master and owners of vessel where slaves found on board, without permission of owner.*
2. *On Bills of Exchange and Promissory Notes.*
3. *In Suits for Freedom.*
XVI. *Rules of Evidence in Courts of the United States.*

I. *Matters Judicially Noticed.*

1. It is unnecessary, in an action on notes issued by a municipal corporation in this State, and circulated as a currency, to prove the authority of the municipal officers by whom they were signed. The circulation of such notes by the corporation is a historical fact, of which the court will take notice without proof.

D'Invilliers v. *Second Municipality of New Orleans*, 123.

II. *Competency of Witness.*

2. A notary, who has given a certificate, in his official character, will not be listened to as a witness to prove its falsehood. *Mathews* v. *Boland*, 200.

3. Where a witness cannot be benefited by a decision, be it either way, no objection can be made to the admission of his testimony.
Bell v. *Western Marine and Fire Insurance Company*, 423.

III. *Examination of Witness.*

4. Where a witness states, that he does not know the general character and standing of a person offered as a witness, he cannot be asked whether he would believe the latter on oath. The reason of the rule is, that no one is supposed to be always ready to explain particular actions suddenly objected against, but every one is presumed always to have within reach evidence of general good character and demeanor. *Stanton* v. *Packer*, 108.
5. Where one seeks to discredit a witness, the proper question is, whether from his knowledge of the general character and standing of the witness, the person interrogated would believe him on oath. *Ib.*

IV. *Commission to take Testimony.*

6. Where a party has filed cross-interrogatories, without having required his adversary to state the names or residence of the witnesses whom he proposed to examine under a commission, or what he expected to prove by them, it will be too late at the time of the trial, to object to the admission of the testimony for the want of such statement. *Denton* v. *Murdock*, 127.
7. The decision in *Evans et al.* v. *Gray et al.*, (12 Mart. 475,) requiring the affidavit to obtain a commission to take testimony, to state the names of the witnesses to be examined, was made when no rule of court existed on the subject, and was before the promulgation of the Code of Practice, which made a change in the law on this subject, by declaring, art. 424, that such testimony "shall be taken pursuant to the rules of the respective courts." *Ib.*
8. Where it appears from the return of the Commissioner, that a witness whose deposition was taken by him, was cross-examined by a member of the bar, not the counsel of record of the party, it will be presumed that he had authority to appear, either from the client, or his counsel of record, unless his authority be denied on oath. *Kelley* v. *Benedict*, 138.
9. The return of "not found" on a subpœna for a witness, and proof that he resides out of the State, will authorize the admission of his testimony taken under a commission. *Ib.*
10. Service of interrogatories to be propounded to a witness under a commission, may be either on the adverse party, or his counsel. No written notification to either is required. C. P. 426. Act 25th March, 1828, chap. 83, § 7. *Hallock* v. *Caruthers*, 190.
11. A commission to take testimony, addressed to a vice-consul of the United States or a commissioner named by the court, returned executed, under his signature as commissioner, is admissible on proof of his signature, and of his having been reputed, and having acted as such vice-consul at a period prior to the execution of the commission. *Stiff* v. *Nugent*, 217.

V. *Judicial Records and Proceedings.*

12. The inventory taken after the death of a wife, is not evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community. *Norés* v. *Carraby*, 292.

13. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy* v. *Bell*, 418.

VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

14. The laws of foreign States may be proved by parol, unless they appear to be statutory or written law. *Rosine* v. *Bonnabel*, 163.

15. Parol evidence is admissible to prove that, by the laws of Spain, a copy of a judicial proceeding, certified by a notary public of the Cabildo, under his signature and *paraph*, his capacity being attested by three other notaries, certifying that his acts are entitled to full faith and credit, would be admissible in any Spanish tribunal. Such evidence having been introduced, proof of the capacity and signatures of the notaries, is all that is necessary to the authentication of the copies. Since the act of 28th February, 1837, ch. 38, requiring "the courts of this State to receive the attestation or certificate of any American consul, general consul, vice-consul, or commercial agent, residing in any foreign country, as legal evidence of the attributes, and official station or authority of any magistrate or other civil officer in such foreign country, under the laws thereof," parol proof of such capacity, which is essentially secondary evidence, is inadmissible; but proof under the great seal of the nation is still good. The capacity and signatures of notaries to copies made out before the act of 1837, may still be proved by parol, under the decision in *Las Caygas* v. *Larionda's Syndics*, (4 Mart. 283.) *Ib.*

16. It is only the attributes and official station of foreign civil officers which are required, by the act of 28th February, 1837, to be proved by the consular certificate, or that of a commercial agent. Parol evidence is admissible to prove the laws of a foreign country, not shown to be statutory or written, relative to the forms of authentication of copies of judicial proceedings. *Ib.*

17. The acts of foreign notaries do not prove themselves, except as to the protests of foreign bills of exchange. *Ib.*

18. One, not a party to a notarial act, may prove its falsehood by competent evidence. *Mathews* v. *Boland*, 200.

19. An order of a Spanish Governor of the province of Louisiana authorizing the oath of allegiance to be administered to a party, and directing him to be maintained in the possession of certain lands, is a public and official act, of which a copy is admissible in evidence. It is not necessary that the original should be produced. Such an act was correctly deposited and recorded

in the office of the Parish Judge of the parish in which the land lies, and he is authorized to certify copies thereof.

Murdock v. *Gurley—Application for Re-hearing*, 467.

VII. *Private Writings.*

20. Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs.

Caldwell v. *Hennen*, 20.

21. In general, where joint obligors or creditors unite in a common acquittance, each will be presumed to have received his share, according to the contract. Each stipulates only for himself. *Marty* v. *His Creditors*, 193.

22. A statement of accounts between the husband and a third person, is not evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community.

Norès v. *Carraby*, 292.

23. The written acknowledgment of the husband is not conclusive, as to third persons, of the amount of the dotal rights of the wife. The amount must be established contradictorily with them, and by conclusive proof.

Dimitry v. *Pollock*, 347.

VIII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in value.*

24. The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to prove a contract, not reduced to writing, to pay a sum of money where the amount exceeds five hundred dollars. C. C. 2257.

Derbes v. *Décuir*, 491.

IX. *Admissibility of Parol Evidence to explain or contradict Written Instruments.*

25. The provision of art. 2256 of the Civil Code, that "parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since," is not confined to acts relative to the transfer of immoveable property or slaves, nor to authentic acts. *Knox* v. *Liddell*, 111.

26. Parol evidence is inadmissible to prove the cancelling of written contracts. Such evidence is inadmissible against a written contract; and proof that it was cancelled, is the strongest evidence that can be given against it.

Sharkey v. *Wood*, 326.

27. Parol evidence of the admissions of a party, tending to contradict positive written evidence, such as the enrolment of a steamer, is inadmissible.

Clark v. *Slidell*, 330.

28. Parol evidence is admissible to establish the truth or falsehood of a representation made to obtain a policy, or to show who is included in a policy made *for the benefit of whom it may concern*. But where a party is expressly named, and his interest specified, or legally understood or presumed,

the policy cannot be changed or altered by parol evidence, unless on an allegation of fraud, error, or other legal cause.

Bell v. *Western Marine and Fire Insurance Co.*, 423.

X. *Secondary Evidence.*

29. A copy of a bill of sale, certified by the Register of a county in another State, as made from the records of his office books, in which it was transcribed, on a certificate from the Clerk of the County Court of that county, that it had been proved before him by the two subscribing witnesses thereto, is inadmissible, being but a copy of a copy, and the evidence disclosing the existence of the original, which was not produced.

Wells v. *McMaster*, 154.

30. Parol evidence is inadmissible to establish a fact of which it appears that the party had written evidence, not accounted for.

Rosine v. *Bonnabel*, 163.

31. The best evidence which the nature of the case admits of, must be produced. Loose admissions, or conversations of parties, cannot supply the absence of documentary evidence, when in existence. The documents themselves must be produced, unless their loss is satisfactorily proved, or their absence clearly accounted for, and then their contents must be established. *Clark* v. *Slidell*, 330.

XI. *Onus Probandi.*

32. To recover in an action for the difference between the price for which a slave was sold to the defendant, and that subsequently obtained on a sale made at the purchaser's risk, on his failure to comply with the terms of the first sale, where there is a general denial, plaintiff must prove that defendant was put *in mora* before the second sale. *Petit* v. *Laville*, 117.

33. The party interested in establishing that a rule of an inferior court has been violated, must show its existence by the record.

Denton v. *Murdock*, 127.

34. One claiming under a bill of sale, signed by an attorney in fact of the vendor, must prove the authority of the attorney. *Wells* v. *McMaster*, 134.

35. In an action against defendants, for damages on account of an injury done to plaintiff's boat by a steamer alleged to belong to the former, who pleaded the general issue, proof that defendants were owners of the steamer, is necessary to a recovery; and where the omission of evidence of ownership was attributable to the oversight of the plaintiff's attorney, the case will be remanded to obtain such proof.

Riley v. *City of Louisville*, 154.

36. To recover in a redhibitory action, the purchaser must prove that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale; in which case, it will be presumed to have existed before. C. C. 2508.

Fox v. *Walsh*, 222.

37. Proof of the promise of a purchaser at an auction sale, to pay any loss that may result from a re-sale of the property on his account, and of his

authority to the auctioneer to do the best he could with the property, will dispense with the evidence which would otherwise be necessary in an ordinary case of sale *à la folle enchère*. *Forsyth* v. *Wilkinson*, 263.

38. Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that plaintiff was not licensed to practice, the burthen of proving that he was not so authorized will be on the defendant, he having employed the plaintiff as such.
Dickerson v. *Gordy*, 489.

39. Against a mere trespasser without right, a plaintiff need only show a *prima facie* title. *Fanchonette* v. *Grangé*, 510.

XII. *Presumption.*

40. Every thing left at the dissolution of the community is presumed to be common, unless it be proved what each spouse brought in. This proof is not required to be by an authentic instrument contemporaneous with the marriage; any legal evidence is admissible. The community, as established by the Spanish law, and the code of 1808, remains unchanged in this respect. Whatever either party brought in, is to be deducted from the mass, and the balance alone divided. It will not suffice to show, that either party was possessed of particular property, or had a sum of money previous to the marriage; it must be shown, that it belonged to him at the time of its celebration. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Norès* v. *Carraby*, 292.

41. Where it is proved, that notes due to the community were discounted by the husband who received the proceeds, they must be charged to him in a settlement of the community, though no proof was offered of their having been paid by the makers. He should be charged with the amount, unless it were shown that, on a failure of the makers to pay, he was forced to do so. *Ib.*

42. Where one stands by, and sees his property sold under legal process, without making his claim known, or objecting thereto, he will be bound by the sale. *Beach* v. *McDonough*, 352.

43. One who stands by in silence, while his own property is sold, and suffers another to become the purchaser, will be estopped from disputing a title so acquired. *Marsh* v. *Smith*, 518.

XIII. *Admissibility of Evidence under the Pleadings.*

44. In an action for a rescission of a purchase made by plaintiffs of defendant's interest in a partnership existing between them, as to the value of which they were deceived by the fraudulent representations of the latter, for a dissolution of the partnership on account of fraud, and for an account: *Held*, that the main issue between the parties being one of fraud, a document showing exorbitant and unfair charges by plaintiffs for merchandize furnished by them to the partnership, was admissible in evidence under the issue.
Littlefield v. *Beamis*, 145.

45. Where it is admitted, that an award was made without the arbitrators having been sworn, parol evidence of their proceedings is inadmissible. *Sharkey* v. *Wood*, 326.

46. In an action for damages for a malicious prosecution, a defendant may, under the general issue, offer in mitigation of damages, evidence of circumstances calculated to show that he had just cause to suspect the plaintiff of the offence with which he was charged. All the circumstances attending the transaction tending to show the defendant's motives, ought to be inquired into. *Hitchcock* v. *North*, 328.

47. In an action against a corporation, based on alleged acts of fraud and deception, on the part of the directors, collectively and individually, evidence is admissible of the acts and declarations of individuals who were, at the time of such acts and declarations, directors and concerned in the alleged fraud. Such acts and declarations, having been made before, and at the time of the transaction, are part of the *res gestæ*. *Marigny* v. *Union Bank of Louisiana*, 354.

XIV. *Evidence of Parties.*

48. Extra-judicial admissions of parties, particularly those made in loose conversations, are the worst species of evidence, and entitled to little weight, unless it be impossible to procure any other. *Clark* v. *Slidell*, 330.

49. Where a party to an action is ordered to answer in open court, interrogatories propounded to him by the opposite party, and the latter fails to have a day fixed for answering them, they cannot, on the failure of the former to answer, be taken for confessed. C. P. 351. *Derbes* v. *Décuir*, 491.

XV. *Evidence in Particular Actions.*

1. *Against Master and Owners of Vessel where slaves found on board without permission of Owner.*

50. Under the first section of the act of 25th March, 1840, the testimony of a witness employed on any steamer or other vessel, on board of which a slave shall have been found, without the written consent of his or her owner, is inadmissible to destroy the legal presumption, established by that act, that the master and owners have received, or hidden, or suffered such slave to remain on board with the intention of depriving the owner thereof, or of transporting him or her out of the State, or from one part thereof to another; but it is admissible to disprove any statements in relation to the facts out of which this presumption grows, such as the finding of the slave on board, the taking from some point within the State, &c. *Feltus* v. *Anders*, 7.

51. The presumption created by the first section of the act of 25th March, 1840, chap. 80, amending the acts previously in force relative to the transportation of slaves out of the State, against the will of their owners, does not exist, where a runaway slave, concealed on board of a vessel, is discovered by the captain, and not by the owner of the slave, and the former pursues the course pointed out by law, for restoring the slave to his owner, and the latter actually recovers possession of him. *Winston* v. *Foster*, 113.

2. *On Bills of Exchange and Promissory Notes.*

52. Where the act of mortgage shows that a note secured by it was endorsed when the act was executed, and the note, with the endorsement on it, was delivered to the mortgagor by the mortgagee, the signature of the endorser need not be proved. *Succession of Porter*, 96.

53. Proof of written notice to the endorser of a note of its non-payment by the makers, and of protest, is necessary to a recovery against him.
McKee v. *Dubois*, 421.

3. *In Suits for Freedom.*

54. Manumission cannot be proved by parol. *Rosine* v. *Bonnabel*, 163.

XVI. *Rules of Evidence in Courts of the United States.*

55. The provision of the fourth section of the act of Congress, of the 25th April, 1812, declaring that no grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as directed by that act, shall be admitted as evidence in any court of the United States, against any grant which may be derived from the United States, establishes a rule of evidence for the courts of the United States; but the rule has no binding authority over the courts of the States.
Murdock v. *Gurley—Application for Re-hearing*, 467.

EXCEPTION.

See PLEADING, IV.

EXCEPTIONS, BILL OF.

1. Bills of exception should be signed by the Judge, before signing the judgment. *Coffin* v. *Pollard*, 124.

2. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.
Penn v. *Collins*, 213.

3. Where a bill of exceptions is not mentioned in the argument, nor otherwise insisted on before the Supreme Court, it will be considered as waived.
Murdock v. *Gurley—Application for Re-hearing*, 467.

EXECUTOR.

See SUCCESSIONS.

EXECUTORY PROCESS.

The consent of the mortgagee to the sale of property mortgaged with the clause *de non alienando*, evidenced by joining in the act of sale, is a waiver

of the right of the direct action, and he cannot afterwards proceed without notice to those who may have subsequently acquired rights. Any proceedings must be against the third possessors of the property.

City Bank of New Orleans v. *Walton*, 158.

FIDEI-COMMISSUM.

Nothing in the laws of this State prohibits a party from holding in his own name lands belonging to another, subject to the order of the latter. Such an arrangement has no analogy to the *fidei-commissa* abolished by the Civil Code. By the latter, the trustee is bound to retain for, and deliver to a third person, the thing confided to him, which is placed beyond the control of the person creating the trust. *Caldwell* v. *Hennen*, 20.

FIERI FACIAS.

1. Where one against whom a *fi. fa.* has been issued, hands to the officer about to make a seizure, certain notes, circulating as currency, in the presence of a third person, who asserts that he is the owner of them, but does not insist on the officer's desisting from taking them away, he will forfeit any claim he may have to them. *Levistones* v. *Claiborne*, 196.
2. The obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser on his eviction, the money received by the former, is merely statutory, (C. P. 711, *et seq.*) and it cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by the plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from the defendant in the execution, the whole sum paid by him. He is entitled to a joint action against both the parties to the execution—against the plaintiff, for the amount received by him, and against the defendant, for the whole sum paid.

Cleary v. *Second Municipality of New Orleans*, 247.

FOREIGN LAWS.

The laws of foreign States may be proved by parol, unless they appear to be statutory or written law. *Rosine* v. *Bonnabel*, 163.

FRAUD.

In an action against a corporation, based on alleged acts of fraud and deception, on the part of the directors, collectively and individually, evidence is admissible of the acts and declarations of individuals who were, at the time of such acts and declarations, directors, and concerned in the alleged fraud. Such acts and declarations, having been made before, and at the time of the transaction, are part of the *res gestæ*.

Marigny v. *Union Bank of Louisiana*, 354.

GOVERNOR AND SENATE.

1. Under the Constitution of this State, the Governor and Senate have no authority to remove an incumbent, where the duration of the office has been determined by law whether for a term of years, or during good behavior. *Nicholson* v. *Thompson*, 367.
2. The Governor has no right to remove an officer during the recess of the Senate. He alone can, in no case, create a vacancy. Nor can he make any appointment to office, without the advice and consent of the Senate, except where a vacancy has occurred during the recess, and then only until the end of the next session of that body. *Ib.*
3. Neither the Governor of this State, nor the Governor and Senate, have any right of removal, as incidental to their power of appointment to office. *Ib.*

HUSBAND AND WIFE.

I. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
II. *Community of Gains.*
III. *Contracts of the Wife.*
IV. *Actions by the Wife.*

I. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*

1. The written acknowledgment of the husband is not conclusive, as to third persons, of the amount of the dotal rights of the wife. The amount must be established contradictorily with them, and by conclusive proof. *Dimitry* v. *Pollock*, 347.
2. The legal mortgage of the wife on the property of the husband, to secure her paraphernal rights, or for the reimbursement of her paraphernal funds paid to him, or applied to the discharge of his debts, only attaches from the date of such payment or application, or from the time when her paraphernal property was placed under his administration, or in his possession. *Ib.*
3. Neither the wife with her legal mortgage and privilege on the property of her husband, nor any other person holding a general or special mortgage, though entitled to be paid by preference out of the proceeds, can prevent an inferior mortgagee from causing the property subject to his mortgage to be sold. C. C. 3245, 3249. C. P. 710, 713, 714, 715. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, when he claims a preference on the proceeds, and the court may order the amount to be retained by the Sheriff subject to its order. *Vanhille* v. *Her Husband*, 496.
4. A wife cannot claim the proceeds of property sold at the suit of a creditor of her husband, or exercise her action of mortgage against property in the hands of a third person, if the latter prove that there is other property sub-

ject to her lien in possession of the husband, or since sold, which she is bound to discuss. *Ib.*

II. *Community of Gains.*

5. Where one claims, as the heir of his mother, against a third person in possession, property which belonged to the community of *acquêts* existing between his parents, he must show that his father had such a title, at the dissolution of the community, as would have enabled him, in his own right and as tutor of his son, to maintain a petitory action for the property; for if any contracts or engagements were entered into by the father, during the existence of the community, which were binding on him, showing that his apparent title was not a real one, whether evidenced by private writings shown to exist, and proved by extrinsic evidence to have a real date, or by authentic acts, they must have been binding on the community, and descended to the heir of the wife as a necessary burden upon his inheritance, estopping him from disturbing a title derived from the community.

Caldwell v. *Hennen*, 20.

6. Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs. *Ib.*

7. Personal property of the parties before marriage, did not, under the Spanish law, become the property of the community, in consequence of the neglect to establish the amount at the time of the marriage.

Norris v. *Carraby*, 292.

8. Every thing left at the dissolution of the community is presumed to be common, unless it be proved what each spouse brought in. This proof is not required to be by an authentic instrument contemporaneous with the marriage; any legal evidence is admissible. The community, as established by the Spanish law, and the code of 1808, remains unchanged in this respect. Whatever either party brought in, is to be deducted from the mass, and the balance alone divided. It will not suffice to show, that either party was possessed of particular property, or had a sum of money previous to the marriage; it must be shown, that it belonged to him at the time of its celebration. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Ib.*

9. Neither the inventory taken after the death of a wife, nor a statement of accounts between the husband and a third person, are evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community. *Ib.*

10. Where it is proved, that notes due to the community were discounted by the husband who received the proceeds, they must be charged to him in a settlement of the community, though no proof was offered of their having been paid by the makers. He should be charged with the amount, unless it were shown that, on a failure of the makers to pay, he was forced to do so.

Ib.

11. A wife has no power to alienate any part of the real or personal estate of

the community, or to throw any obstacle in the way of its disposition by the husband, during the existence of the community. But she may dispose of her private estate, and consequently of that portion of the community property, which, after her death and the settlement of the community, may become part of her estate. *Preston* v. *Humphreys*, 299.

12. Where subsequently to the date of a will by which the wife bequeathed all her interest in certain community property, but before the dissolution of the community by the death of the wife, the husband sells the property to the devisee, there is an end of the devise, which is ambulatory and without effect until the death of the testatrix. Had there been no sale, the devisee might, after the settlement of the community, have claimed the interest under her will. *Ib.*

13. The legatees of the husband or wife, have no claim against the community until all its debts are paid. *Ib.*

III. *Contracts of the Wife.*

14. A married woman has no mortgage on the real estate of her husband, for the reimbursement of money paid by her as his co-obligor *in solido*, where the law authorized her to join in the contract.

Arrieux v. *Dugas.—Rehearing*, 457.

15. A woman of full age, not under the control of a husband, stands on the same footing as any other person able to contract. She will be presumed to have intended to bind herself in the manner in which she actually bound herself, and will not be listened to when she simply alleges that she acted inadvisedly, and without sufficient information. C. C. 1775.

Dugat v. *Comeau*, 475.

IV. *Actions by the Wife.*

16. Where the petition of a married woman alleges, that she is authorized by her husband to sue, proof of authorization will only be required when specially denied *in limine litis*. *Succession of Porter*, 96.

HYPOTHECARY ACTION.

See Executory Process.

INJUNCTION.

One making a third opposition is not required to make an oath in order to obtain an injunction. C. P. 399. *Vidal* v. *Ocean Insurance Company*, 68.

INSOLVENCY.

1. The act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy suspended, if it did not abolish, all the laws of the different States relative to insolvent debtors, taking away the jurisdiction of their

tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The State courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings. *Clarke* v. *Rosenda*, 27.

2. Any contract or agreement between an insolvent and one of his creditors, the effect of which is to secure to the latter an undue preference over the other creditors, or to procure for him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. It matters not as to the nature of the opposition, if its withdrawal be the consideration or cause for which the preference is given. Thus, an agreement in consideration of the withdrawal of an opposition to the sufficiency of the security offered by an insolvent, who had been appointed syndic of his own creditors, though the opposition was made after the insolvent had obtained his discharge, of the benefit of which he could not be deprived by any subsequent opposition, is illegal and void. It is sufficient that an undue advantage is derived from it by one of the creditors. The object of the law is, that the rights of all the creditors should remain in the state they were in, at the time of the insolvency; that no change should take place so as to favor any; and that the effects surrendered, and the property subsequently acquired, should be equally divided between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims at the time of the surrender, or of the contracting of the subsequent debts. *Slidell* v. *Pritchard*, 101.

3. Money paid to a creditor, in pursuance of an illegal agreement with an insolvent, who had been appointed the syndic of his own creditors, to secure the payment of the creditor's claim, in consideration of his withdrawing an opposition to the sufficiency of the security offered by the syndic, cannot be recovered back, either by the debtor, or by an assignee of his property, under a bankrupt law, suing for the benefit of the creditors, or by a security, who may have paid the amount so reclaimed. Though the cause of the agreement was unlawful, it originated in a natural obligation, on which no action could be founded, but which sufficed to prevent the recovery of the money back, when once paid. C. C. 2281, 2282. *Ib.*

4. The State tribunals were not deprived, by the bankrupt law of 19 August, 1841, of any portion of their jurisdiction, necessary to the final administration of the estates of insolvents who had made a surrender of their property previous to its passage. A State court, in which a surrender was made, has authority to decide, between the syndic of the creditors under the cession in the State court, and an assignee subsequently appointed by the United States Court under the bankrupt act, the right to property alleged to have been ceded under the State law, but afterwards placed on the schedule of the debtor, on his application to be declared a bankrupt.

West v. *His Creditors*, 261.

5. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mortgagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year.

Prats v. *His Creditors*, 288.

6. Where a debtor has made a *cessio bonorum*, all his debts, whether payable then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Légér* v. *Arcenaux*, 513.

INSURANCE.

1. The contract of assurance must always be made in writing. The terms of the contract must be sufficiently expressed, every necessary stipulation being inserted. The policy is the contract between the parties, and, as a general rule, all proposals or conversations prior to the subscription, are considered as waived, if not inserted in the policy, or in a memorandum annexed to it. Correspondence, or other communications cannot be referred to, unless to explain some ambiguity, or to sustain an allegation of error or fraud, or some fact that would have affected the risk.

Bell v. *Western Marine and Fire Insurance Company*, 423.

2. Parol evidence is admissible to establish the truth or falsehood of a representation made to obtain a policy, or to show who is included in a policy made *for the benefit of whom it may concern*. But where a party is expressly named, and his interest specified, or legally understood or presumed, the policy cannot be changed or altered by parol evidence, unless on an allegation of fraud, error, or other legal cause. *Ib.*

3. Policies of insurance are to be construed like any other written contract, in which the intention of the parties must be sought in the instrument itself. Plain mistakes, and frauds, may be corrected. *Ib.*

4. All losses or risks may be insured against, except such as are forbidden by public policy, or positive prohibition, or those occasioned by the misconduct or fraud of the insured. *Ib.*

5. It is essential to the contract of insurance, that there should be an interest at risk; but not that the thing insured should have what is properly called a value, or price, or be assignable. *Ib.*

6. Policies may be effected on a future interest, but the interest must subsist at the time of the loss, to give rise to a claim for indemnity. *Ib.*

7. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not cre-

ate an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons. *Ib.*

8. The interest of the party by whom property is held as security, is an insurable one. Hence the right of agents, consignees and factors, to insure the goods of their principals. *Ib.*

9. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained. *Ib.*

10. A general description of the thing insured is sufficient. One owning but a part of a ship, or of a quantity of goods, or a mortgagee, may insure generally, without specifying his interest. *Ib.*

11. An application for insurance *for whoever it may concern*, is sufficient notice to put the insurers on their guard, and to throw upon them the obligation of inquiring further, if other information be desired. *Ib.*

12. A deviation is the increasing, or varying of the risk insured against, without necessity, or reasonable cause. *Ib.*

13. Where a boat, on which insurance had been effected by an owner or vendor retaining a privilege, is removed to the opposite side of the river by the Marshal of a court in which she had been libelled, and there kept by him, there being no proof that the risk was at all increased, it will not amount to such a deviation as to forfeit the policy; nor will it be forfeited by the fact that she had not a captain and crew on board when so laid up. When on a voyage, or in a port receiving or discharging cargo, a boat should be properly manned and officered; but it is neither usual, nor necessary, when laid up. *Ib.*

INTEREST.

1. Where a purchaser at a credit sale, availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent per annum, from the price for such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate.
Dowlin v. *New Orleans and Nashville Rail Road Company*, 5.

2. Interest is due, from judicial demand, on an amount recovered as damages for property lost by a common carrier. The sum claimed arises out of a contract, though the amount due was unliquidated. *Clines* v. *Frisbee*, 192.

3. In an action, by the purchaser, for damages in consequence of the inferiority of the article to that of the samples by which it was sold, interest may be recovered, at five per cent, from judicial demand, but not from the date of the purchase. *Stiff* v. *Nugent*, 217.

4. Interest is a matter of law, and when arising, *ex mora*, is in the nature of damages for non-payment of money due by contract. *Ib.*

See COMMERCIAL BANK OF NEW ORLEANS, 2.

INTERPRETATION.

1. The rules which govern in the construction of a statute, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation. *Nicholson* v. *Thompson*, 367.
2. Natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled. *Le Breton* v. *Lewis*, 479.
3. Inaccurate or ungrammatical language in the certificate of a notary, will not vitiate it, where the meaning is obvious.
New Orleans Gas Light and Banking Company v. *Hudson*, 486.

INTERROGATORIES.

See EVIDENCE, XIV.

INTERVENTION.

See PLEADING, 9.

JOINT OBLIGORS.

See CONTRACTS, II.

JUDGMENT.

1. A rule having been taken on the surety in an attachment bond to show cause why he should not pay the amount of the judgment against his principal, the former, on the return day of the rule, demanded to see the bond, which, having been misplaced, could not be produced; and the parties separated, the rule not having been discharged, made absolute, or extended. Judgment having been afterwards rendered in favor of the plaintiff in the rule, without further notice to defendant, in an action by the latter to annul: *Held*, that a new rule should have been taken, and that the judgment must be annulled. *McKeever* v. *Keyes*, 61.
2. The neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Lachomette* v. *Thomas*, 172.
3. In actions on joint obligations, judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. C. C. 2080, *et seq.*
Duggan v. *De Lizardi*, 274.

4. Under arts. 608 and 616, of the Code of Practice, a Court of Probates has jurisdiction to annul or rescind decrees or judgments rendered by itself, though the controversy involve the ownership of immoveable property.
Darse v. *Leaumont*, 284.

5. A fraud perpetrated by the machinery of a judgment, where the court was made the unconscious instrument, is as liable to be annulled as when effected in the usual form of a contract. *Prats* v. *His Creditors*, 288.

6. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy* v. *Bell*, 418.

7. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *Ib.*

8. No particular form is necessary to a confession of judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a part of the sum claimed, it is a confession, *pro tanto;* and there is no reason why the creditor should be delayed in the collection thereof, until a decision be had on the disputed portion. *Skinner* v. *Dameron*, 447.

9. A judgment rendered in a State court against a party declared a bankrupt under the act of Congress of 1841, and to whom an assignee had been appointed, without such assignee having been made a party, is a nullity.
Harrod v. *Burgess*, 449.

10. In an action for the price of a slave, resisted on the ground of a suit for freedom having been instituted by such slave, for the purposes of justice the court may order a stay of execution till security be given against the danger of eviction, though not prayed for in the answer, and even though there be no prayer by defendant for general relief. *Carson* v. *Dwight*, 484.

11. A judgment having been obtained by the United States in a District Court of the United States, against plaintiff's testator in his lifetime, an execution was issued after his death, without any steps having been taken to revive the suit, under which property was sold by the Marshal, and purchased by defendant. In an action before a State court, by the representatives of the deceased against the purchaser, for the property: *Held*, that the act of Congress of 26th May, 1824, regulating the mode of practice in the Courts of the United States in Louisiana, having provided that it shall be conformable to the laws directing the mode of practice in the District Courts of the State, the United States had no right to execute their judgment without having instituted proceedings to revive it; and that the State court had jurisdiction to look into the proceedings of the executive officer subsequent to the judgment, to ascertain between citizens of the State, what rights had

been taken from the one and given to the other. Judgment for the plaintiffs. *Garrard* v. *Reed*, 506.

JURY.

1. A judge has no right in the capacity of clerk to the jury, even at their request, to draw up a verdict for them. He may instruct them as to the form of their verdict, (C. P. 515, 528;) but it is the duty of the foreman to prepare it. Ib. 524. The Judge may tell them, that it is in their power to find either a general, or a special verdict, but it is for them to determine which they will find. Ib. 519, 521, 524. *Gove* v. *Breedlove*, 78.

2. In a charge to the jury, the Judge must limit himself to giving them a knowledge of the law applicable to the case, abstaining from saying any thing about the facts, or even recapitulating them in such a way as to exercise any influence on their decision. Nor ought he to state his own conclusions from the evidence. *Ib.*

3. Damages cannot be assessed without the intervention of a jury. Art. 313, of the Code of Practice, which requires, when damages are to be assessed in confirming a judgment by default, that a jury shall be summoned to find them, as if the defendant had answered, and that the judgment shall be in conformity with their verdict, is not repealed by the 17th section of the act of 10th February, 1841, chap. 16, which provides, that the prayer for a trial by jury in any case before the District, Parish, or Commercial Court of New Orleans, shall be disregarded, and the case tried by the court, unless the party shall have advanced the compensation allowed to the jurors, in those courts, on filing his petition or answer praying for such trial. *Guillotte* v. *Thompson*, 141.

4. It is no ground for a new trial, that a juror took up and looked over certain balance sheets, which had been rejected as inadmissible, in an action for the dissolution and settlement of a partnership, where the counsel of the party against whom they were offered, noticed the fact at the time but made no objection, and the papers were not taken by the jury into their room, and it was not shown that their contents were communicated to the other jurors, or that they did or could exercise any influence over the jury in making up their opinions. *Littlefield* v. *Beamis*, 145.

5. No law requires that a jury shall carry with them into their consultation room all the documents and papers submitted to them. It is at their pleasure to do so, or not. *Ib.*

6. Plaintiff having recovered damages in an action for a malicious prosecution tried by a jury before a Parish Court, defendant appealed to the District Court, which confirmed the judgment. There was no prayer for a trial by jury before the District Court; but defendant moved for a new trial in that court, on the ground, that the case could not be tried by it without a jury. The new trial was refused, and the defendant again appealed. *Per Curiam.* It was too late to ask for a jury on a motion for a new trial; and it may well be doubted whether a trial by jury can be required in the District Court sitting for the trial of appeals. *Bouquevalte* v. *Young*, 162.

7. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.

Penn v. *Collins*, 213.

8. The verdict of a jury will not be disturbed, unless clearly erroneous, especially when pronounced upon questions of fraud.

Barnett v. *His Creditors*, 291.

LETTING AND HIRING.

I. *Letting of Things.*

II. *Hire of Labor or Industry.*

I. *Letting of Things.*

1. Where the lessors of property, without the consent of the sureties of the lessees, take back a part which had been occupied by the lessees as a dwelling, and relet it to a third person, the sureties will be released, the contract being materially altered without their assent. *Per Curiam.* It must be presumed, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation to which they were legally entitled to the lessor's rights and privileges, among others, upon the furniture which existed in the dwelling house. C. C. 2675, 2676, 2677, 2679, 3030. *Penn* v. *Collins*, 213.

2. Where the lessors of property, having sued the lessees for the rent due, and to come due under the contract, and caused property, on which they had the lessors' privilege, to be seized to an amount equal to the rent due, and to come due, abandon the seizure without a trial, the sureties of the lessees will be discharged. *Ib.*

3. The lessee of a part of a building, in which, by the regulations of the lessors, sales at auction were to be made, cannot maintain an action against a sheriff for making his sales in another apartment leased for another purpose, nor against the lessor of such apartment, who is not shown to have received any remuneration for allowing such sales, and between whom and the plaintiff no privity exists.

Castaing v. *New Orleans Improvement and Banking Company*, 246.

II. *Hire of Labor or Industry.*

4. Where a clerk, employed at a fixed salary, for a year, is discharged, without sufficient cause, before the expiration of his time, he will be entitled to recover the whole amount which would be due at the end of his term.

Lartigue v. *Peet*, 91.

5. A tutoress, employed for a term of years, at a yearly salary, who leaves her employer before the expiration of the term, on account of his failure to pay her salary either quarterly or annually, will not thereby forfeit the amount already due. The defendant's failure to pay released her from her contract. *Lefrançois* v. *Charbonnet*, 185.

MALICIOUS PROSECUTION.

In an action for damages for a malicious prosecution, a defendant may, under the general issue, offer in mitigation of damages, evidence of the circumstances calculated to show that he had just cause to suspect the plaintiff of the offence with which he was charged. All the circumstances attending the transaction tending to show the defendant's motives, ought to be inquired into. *Hitchcock* v. *North*, 328.

MANDAMUS.

1. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages.

Conrad v. *Prieur*, 49.

2. Where a Judge of Probates has rendered a judgment refusing to homologate the proceedings of a family meeting, he cannot be compelled by mandamus to do so. *State* v. *Judge of Probates of Jefferson*, 161.

MINOR.

1. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer where there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. *Willcox*, 83.

2. When a minor has no ascendant in the direct line, the Probate Judge is not to appoint his presumptive heir, as tutor. C. C. 285. When there are relations who may claim the tutorship by the effect of law, or who are bound to accept the same, and the Judge is called upon to appoint a tutor from among them, the tutorship is a legal one, and he cannot appoint the presumptive heir, but must select the nearest of kin who comes after such presumptive heir or heirs. *Tutorship of Labarre*, 268.

3. It is only where a minor has no relations who may claim the tutorship by the effect of the law, or who are bound to accept the same, that there is room for a dative tutorship. C. C. 288. *Ib.*

4. Where in an action against a tutor for a settlement of his accounts, plaintiffs moved that the account rendered by the tutor should be homologated so far as it was not opposed by certain creditors, they cannot be permitted afterwards to allege errors therein. By provoking the homologation, plaintiffs waived their right to oppose the account. *Norès* v. *Carraby*, 292.

5. The case must be a very strong one that will justify the removal of a parent

from the tutorship of child; on the ground of notorious bad conduct. It should not be done on light or doubtful testimony.

Tutorship of Kershaw, 488.

MORTGAGE.

I. *Conventional Mortgages.*
II. *Tacit and Legal Mortgages.*
III. *Right of Mortgagee to Insure.*
IV. *Proceedings by Mortgagee after Death of Mortgagor.*
V. *Mortgages as affected by the Bankrupt Law of the United States of* 19 *August*, 1841.
VI. *Registry of Mortgages.*

I. *Conventional Mortgages.*

1. Where two persons purchase jointly, each an undivided half of certain property, and give their notes endorsed by each other for the price, mortgaging the whole property to secure the payment of the whole price, on the sale of either half, the proceeds must be distributed proportionably among the holders of the different notes. The holder of the notes *made* by the purchaser whose half was sold, cannot claim the whole proceeds of his half of the property. *Gordon* v. *His Creditors*, 47.

2. Defendants purchased jointly certain lots of ground, giving their separate notes, payable at different periods, each for one-third of the price. The act of sale declared, that they were interested in the purchase in the same proportion; and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers having paid their notes, plaintiff obtained an order of seizure and sale, against the whole property, for the amount of the remaining note. *Held*, that the obligations of the purchasers, though in the same act, are as separate and distinct as if made by different contracts at different times, each purchaser being only bound for his third of the price; and that the notes of each were intended to be secured by a mortgage on his portion only of the property. *Erwin* v. *Greene*, 70.

3. Where the act of mortgage shows that a note secured by it was endorsed when the act was executed, and the note, with the endorsement on it, was delivered to the mortgagor by the mortgagee, the signature of the endorser need not be proved. *Succession of Porter*, 96.

4. The consent of the mortgagee to the sale of property mortgaged with the clause *de non alienando*, evidenced by joining in the act of sale, is a waiver of the right of the direct action, and he cannot afterwards proceed without notice to those who may have subsequently acquired rights. Any proceedings must be against the third possessors of the property.

City Bank of New Orleans v. *Walton*, 158.

5. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mort-

gagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year. *Prats* v. *His Creditors*, 288.

II. *Tacit and Legal Mortgages.*

6. Where a sheriff, by whom property has been sold under a first mortgage, pays over the surplus of the proceeds, remaining after its satisfaction, in discharge of subsequent general mortgages, binding on the defendant, he will not be liable to the latter, the act causing him no damage.

Powell v. *Kellar*, 272.

7. The legal mortgage of the wife on the property of the husband, to secure her paraphernal rights, or for the reimbursement of her paraphernal funds paid to him, or applied to the discharge of his debts, only attaches from the date of such payment or application, or from the time when her paraphernal property was placed under his administration, or in his possession.

Dimitry v. *Pollock*, 347.

8. A married woman has no mortgage on the real estate of her husband, for the reimbursement of money paid by her as his co-obligor *in solido*, where the law authorized her to join in the contract.

Arrieux v. *Dugas,—Rehearing*, 453.

9. Neither the wife with her legal mortgage and privilege on the property of her husband, nor any other person holding a general or special mortgage, though entitled to be paid by preference out of the proceeds, can prevent an inferior mortgagee from causing the property subject to his mortgage to be sold. C. C. 3245, 3249. C. P. 710, 713, 714, 715. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, when he claims a preference on the proceeds, and the court may order the amount to be retained by the Sheriff subject to its order. *Vanhille* v. *Her Husband*, 496.

10. A wife cannot claim the proceeds of property sold at the suit of a creditor of her husband, or exercise her action of mortgage against property in the hands of a third person, if the latter prove that there is other property subject to her lien in possession of the husband, or since sold, which she is bound to discuss. *Ib.*

III. *Right of Mortgagee to Insure.*

11. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not create an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons. *Bell* v. *Western Marine and Fire Insurance Co.*, 423.

IV. *Proceedings by Mortgagee after Death of Mortgagor.*

12. Art. 986 of the Code of Practice, does not apply to a liquidated claim

secured by a special mortgage. A mortgage creditor is not bound to bring a suit against the succession, before calling on the curator or administrator for the payment of the debt. A simple order from the Probate Judge is sufficient. *Succession of Porter*, 96.

13. Mortgage creditors of a succession, though it be insolvent, are not bound to wait; they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and their wish must always prevail, in this respect, over that of the other creditors. C. C. 1163, 1663. C. P. 990, 991, 992, 995. *Ib.*

14. Where a Probate Judge orders the sale of mortgaged property to be made for cash, it is not necessary that he should insert in the order the condition imposed by law, that its appraised value be obtained. The law itself fixes the amount the property must bring, when the sale is for cash; and unless the appraised value be obtained there can be no adjudication. *Ib.*

15. A legatee of mortgaged property cannot require to be proceeded against as a third possessor, where it is not shown that she has been put in possession of the property. *Ib.*

V. *Mortgages as affected by the Bankrupt Law of the United States, of 19th August*, 1841.

16. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Clarke* v. *Rosenda*, 27.

17. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Conrad* v. *Prieur*, 49.

18. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*

19. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of

such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessary to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Ib.*

20. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages. *Ib.*

VI. *Registry of Mortgages.*

21. The neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Lachomette* v. *Thomas*, 172.

NEW ORLEANS, CITY OF.

1. The interest of five per cent per annum, allowed to the City of New Orleans by section 23 of the act of 1st April, 1833, incorporating the Commercial Bank of New Orleans, is to be calculated on the surplus of the semi-annual dividends on the stock subscribed for by the City, remaining after the payment of the interest on the bonds given to the Bank by the City, and directed to be set apart as a sinking fund. It was not intended, that interest should be calculated on such surplus every six months, and be added thereto, so as to form new capital, bearing like interest. The Legislature did not intend to allow compound interest.

Mayor &c. of New Orleans v. *Commercial Bank of New Orleans*, 234.

2. Under the 4th section of the act of April, 1835, bonds or recognizances taken by a Recorder of any Municipality of the city of New Orleans, in a criminal matter, can only be recovered by the city attorneys for the use of the corporation. From the moment of forfeiture, the corporation was vested with the right to sue for their recovery. The Attorney General cannot enforce the payment of such a bond, in the name, and for the benefit of the State. An action for the recovery of the bond is a civil proceeding; and one cannot be permitted to sue to enforce obligations in which he has no interest. *State* v. *Desforges*, 253.

3. The 4th section of the act, of 1st April, 1835, appropriating to the city of New Orleans the amounts recovered on all bonds and recognizances taken by the associate Judges of the City Court, the Mayor, or Recorder, within

that city, for the public peace, or in criminal matters generally, and directing how they shall be sued on, was not repealed by the act of 11 March, 1837, chap. 73, providing for the support of the Charity Hospital. *Ib.*

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

Under the act of the Legislative Council of the 31st of March, 1805, which created the offices of Master and Wardens of the Port of New Orleans, the tenure of those offices was at the will of the executive. That act conferred the power of appointment on the Governor alone, to be exercised as often as he should think necessary, and he alone was to be the judge of that necessity. The incumbent might be superseded, at any time, by a new appointment emanating from the Governor. The Legislature never having obeyed the injunction of section 8, article 6, of the Constitution, by determining the duration of the offices of Master and Wardens of the Port of New Orleans, the act of 1805 has continued in force, under section 4 of the schedule appended to the Constitution. The power conferred on the Governor by the act of 1805, of making new appointments to those offices whenever he shall deem it necessary, is not inconsistent with the provision of section 8, article 6, of the Constitution, authorizing the removal of public officers by an address of two-thirds of both houses of the Legislature. Both powers may be exercised concurrently. The Constitution has not repealed the act of 1805; it has only modified it so far as to require the concurrence of the Senate in making new appointments, and in superseding the incumbents. The question of the necessity of such appointments, is not one which the judiciary can assume to decide.

Nicholson v. *Thompson*, 367.

NEW TRIAL.

1. Where a cause has been tried by a jury, and no motion was made for a new trial, it must be an extreme case to induce the remanding of it.

Denton v. *Murdock*, 127.

2. It is no ground for a new trial, that a juror took up and looked over certain balance sheets, which had been rejected as inadmissible, in an action for the dissolution and settlement of a partnership, where the counsel of the party against whom they were offered, noticed the fact at the time but made no objection, and the papers were not taken by the jury into their room, and it was not shown that their contents were communicated to the other jurors, or that they did or could exercise any influence over the jury in making up their opinions. *Littlefield* v. *Beamis*, 145.

3. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.

Penn v. *Collins*, 213.

NONSUIT.

Plaintiffs' counsel in an action to be tried by jury, left the court-room for a few minutes, after another jury case had been called, with the trial of which the court could not proceed for the want of a sufficient number of jurors, there being only five or six present, and attachments having been issued. During his absence their case was called, and the plaintiffs nonsuited. At the time of his return, a sufficient number of jurors had not yet arrived. On appeal: *Held*, that the plaintiffs should not have been nonsuited. *Per Curiam.* Had their counsel been present, he could not, in the language of art. 536 of the Code of Practice, *have pleaded their cause*, no jury having been formed; nor could the defendant, for the same reason, have tried the case *ex parte*.
Buchanan v. *Locke*, 211.

NOTARY.

1. The acts of foreign notaries do not prove themselves, except as to the protests of foreign bills of exchange. *Rosine* v. *Bonnabel*, 164.
2. A notary who has given a certificate, in his official character, will not be listened to as a witness to prove its falsehood. *Mathews* v. *Boland*, 200.

NULLITY OF JUDGMENT.

See JUDGMENT, 1, 5, 9.

OFFENCES AND QUASI-OFFENCES.

1. An action to recover a drawback due on certain articles subject to an import duty, and for the value of merchandize detained from the plaintiff, is not an action for the recovery of damages for an offence or quasi-offence, in the meaning of the third section of the act of 14th March, 1839, ch. 17, establishing the Commercial Court of New Orleans; but is within the jurisdiction of that court. C. C. 2294 to 2304. *Gove* v. *Breedlove*, 78.
2. Though a defendant may have acted without malice, yet, if his conduct has been marked by great imprudence, and a want of due regard for the rights and feelings of the plaintiff, he will be responsible to the latter, for whatever damage his conduct has caused. C. C. arts. 1928, No. 3, 2294, 2295.
Kernan v. *Chamberlin*, 116.
3. In an action against defendants, for damages on account of an injury done to plaintiff's boat by a steamer alleged to belong to the former, who pleaded the general issue, proof that defendants were owners of the steamer, is necessary to a recovery; and where the omission of evidence of ownership was attributable to the oversight of the plaintiff's attorney, the case will be remanded to obtain such proof. *Riley* v. *City of Louisville*, 184.
4. Though the drawer of a bill may be discharged from his obligation to pay it, by the neglect of the holder to have it presented at the place of payment

and protested, and to have notice given thereof, on the ground of the damage he is presumed to have sustained by the *laches* of the latter, yet, if he afterwards withdraws from the hands of the drawee the funds on which he had drawn, he will be responsible, under art. 2294 of the Civil Code, to the holder, who had become the owner thereof, for the amount.

Keith v. *Mackey*, 277.

5. The owner of a slave, hired to another and drowned while employed, with the consent of his master, in a work not proved to have been of a dangerous character, cannot recover his value. *Hudson* v. *Grout*, 499.
6. A stake-holder who pays over the amount bet on a horse-race, without the sanction of a majority of the judges of the race, will be responsible to the winner. *Dauterive* v. *Broussard*, 516.

PARTNERSHIP.

1. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned for want of care or skill in those in charge of the boat. *Kelly* v. *Benedict*, 138.
2. Art. 2818 of the Civil Code, which requires the contract by which a partnership *in commendam* has been created, to be recorded in the office of the Recorder of Mortgages, within six days from the time of its execution, is directory only. The omission to record the contract within that period, will not subject the partner *in commendam* absolutely to all the responsibilities of an ordinary partner towards third persons. So long as the contract is unregistered, he will be liable as an ordinary partner to the creditors of the partnership; but it is otherwise as to those who may contract with the partnership after such registry, whenever made; they being notified of the extent of his responsibility. Notice to third persons is the principal object of the registry. Art. 2819. *Lachomette* v. *Thomas*, 172.
3. By the French law, a partner, *in commendam*, is viewed as a simple furnisher of funds, liable to the partnership, but not to third persons. The creditors have no direct action against him, in their own name, though they may compel him to pay whatever he may owe to the acting partners, by exercising the rights of the latter against him, under art. 1166 of the Code Napoleon. *Ib.*
4. After the dissolution of a partnership, none of the partners can use the social name so as to bind the rest; nor can the latter be bound by any acknowledgment of a debt, or account, so made by the others. *Ib.*

PHYSICIAN.

1. Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that plaintiff was not licensed to practice, the burthen of proving that he was not authorized will be on the defendant, he having employed the plaintiff as such.

Dickerson v. *Gordy*, 489.

2. Persons practicing as physicians without having been licensed as required by law, can claim no compensation for their services. *Ib.*

PLAQUEMINES, ROADS AND LEVEES IN PARISH OF.

See ROADS AND LEVEES.

PLEADING.

I. *Parties to Actions.*
II. *Of the Petition.*
III. *Actions where to be brought.*
IV. *Exceptions and Answer.*
V. *Demands in Reconvention.*
VI. *Opposition of Third Persons.*
VII. *Admissions, and Answers to Interrogatories.*
VIII. *Agreements between Parties or Counsel.*

I. *Parties to Actions.*

1. No action whatever, executory or ordinary, can be maintained against a bankrupt, regularly discharged under the act of Congress of 19th August, 1841, for a debt contracted previous to his bankruptcy, where the plaintiff was placed on the list of creditors filed in compliance with the act. The action must be against the assignee.

City Bank of New Orleans v. *Walton*, 158.

2. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 120. C. C. 1370, *et seq*; *aliter* as to co-obligors by joint contract, all of whom must be sued together. C. C. 2080 *et seq.* In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan* v. *De Lizardi*, 224.

3. In actions on joint obligations, all the original parties must be sued together even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. (C. C. 2080 *et seq.*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees.

Ib.

4. Where one stipulates in a sale that his vendee shall pay to his vendor a balance of the price yet due, the original vendor may be viewed as merely *adjectus solutionis gratia*—entitled to receive, but not to sue for the amount. Not being a party to the contract, he will not be bound by its stipulations,

and may continue to look to his own vendee for payment; while, on the other hand, the parties to the agreement may annul it. But if he, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent; and he may sue to recover the amount thus stipulated in his behalf. *Mitchell* v. *Cooley*, 240.

5. Doubts as to the construction of a contract cannot avail one, who not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Ib.*

6. In an action in the name of the State to recover the penalty of a bond taken for the appearance of one of the obligors, the defendants may urge, for the first time, after appeal, that nothing became due to the State by its forfeiture. *Per Curiam.* Such an objection is not based on the mere incapacity to sue, which must be specially denied, but, tending to show the absolute want of any legal right in the State, may be taken advantage of at any stage of a cause. It goes to show that the plaintiff has no interest in the subject matter of the suit, and that the right of action does not belong to the party who seeks to enforce it. *State* v. *Desforges*, 253.

7. The word "*actual*" in art. 43, of the Code of Practice, which requires that a petitory action must be brought against the person in actual possession of the immoveable, does not mean strictly a natural or corporeal possession, in the sense of arts. 3391, 3393, of the Civil Code. It applies to a civil, as well as to a natural possession, where the defendent pretends to possess as owner. The civil possession of the defendant at the time of suit, preceded by an actual corporeal detention of the property, will suffice. *Barnes* v. *Gaines*, 314.

8. An exception by the garnishees, in a suit against a corporation existing in another State, filed after issue joined, that the plaintiffs did not make certain assignees or trustees of the corporation, under a deed of assignment, parties to the action, will be disregarded where it does not appear that the plaintiffs were parties to the deed, or that they, or the garnishees had notice of the assignment of the debt attached, previous to the institution of the suit, and neither the corporation, nor its assignees ask to be heard. *Bean* v. *Mississippi Union Bank*, 333.

9. The assignee of a bankrupt under the act of Congress, of 19th August, 1841, may come into the State courts, for the purpose of protecting the interests confided to him. *Harrod* v. *Burgess*, 449.

10. One acting as an agent, may sue in his own name for the recovery of the amount of a draft drawn by himself, and accepted by the debtor of his principals. *Johnson* v. *Brashear*, 477.

II. *Of the Petition.*

11. The character of an action depends upon the prayer for judgment. *Lagay* v. *Chieusse*, 132.

12. To recover of the owners of a steamer, as common carriers, the value of property lost or destroyed by them, it is sufficient to allege that the defend-

ants undertook as carriers to convey the property for hire, and failed to do so. Any specification of the acts, or neglect which occasioned the loss, may be regarded as surplusage, and can furnish no ground for excepting to the petition as uniting distinct causes of action—a cause *ex contractu*, with one *ex delicto*. *Kelly* v. *Benedict*, 138.

13. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767, of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin* v. *Delaroderie*, 202.

14. It is not to be expected that a plaintiff can describe in his petition with great accuracy the debts, or forms of the obligations between his debtor and the garnishees in an attachment suit. He has not, in many cases, the necessary information to enable him to do so.

Bean v. *Mississippi Union Bank*, 333.

III. *Actions, where to be brought.*

15. The master and owner of a steamer plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, must be sued in the parish proved by witnesses to be that of his domicil; and this, though he may have declared, in the enrolment of his boat, taken out before the inception of the suit, that his usual place of residence is in the place where the action was brought. *Ricard* v. *Kimball*, 142.

16. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983.

Barnes v. *Gaines*, 314.

IV. *Exceptions and Answer.*

17. Where the petition of a married woman alleges, that she is authorized by her husband to sue, proof of authorization will only be required when specially denied *in limine litis*. *Succession of Porter*, 96.

18. An exception to the sufficiency of the description in the petition of the notes sued on, will be overruled, where the notes themselves are annexed to the petition for reference.

D'Invilliers v. *Second Municipality of New Orleans*, 123.

19. Action by a tenant against his lessors, for damages for a disturbance, in his enjoyment of the premises. Defendants excepted to the petition, denying any disturbance, but averring if there had been any, it did not proceed from them, or from those over whom they had any control, or for whose acts they could be held responsible. The exception having been sustained below, and the suit dismissed, on an appeal by plaintiff: *Held*, that the plea of defendants was rather an answer to the merits, than an exception, and that the court erred in dismissing the suit, without a trial on the issues made up between the parties.

Castaing v. *New Orleans Improvement and Banking Company*, 177.

20. Every means of defence, such as payment, release, novation, &c., which goes to show the extinguishment of an obligation admitted, or proved to have once existed, must be pleaded specially, and cannot be urged under the general issue, which only denies the facts alleged in the petition. The plaintiff might otherwise be taken by surprise.

New Orleans Gas Light and Banking Co. v. *Hudson*, 486.

21. A plea of release not made in the lower court, will not be listened to by the Supreme Court. This defence will be presumed to have been waived. *Ib.*

V. *Demands in Reconvention.*

22. Where the object of an action is to establish that defendant, a builder, has been paid for the work done by him under a contract with plaintiff, and to procure its erasure from the books of the Recorder of Mortgages, defendant may claim in reconvention a balance due to him, under another contract, for buildings and materials constructed on the same lot. *Percy* v. *Peyroux*, 179.

VI. *Opposition of third Persons.*

23. The assignee of a bankrupt, under the act of 19th August, 1841, who claims the interest of the latter in a suit, may file a third opposition, for the purpose of asserting the rights of the creditors whom he represents. C. P. 396. *Vidal* v. *Ocean Insurance Company*, 68.

24. One making a third opposition is not required to make an oath in order to obtain an injunction. C. P. 399. *Ib.*

VII. *Admissions and Answers to Interrogatories.*

25. The president and directors of a bank have no authority, without the consent of the stockholders, to confess a forfeiture of the charter. But where, in their answer to an application on the part of the State for such forfeiture, they do not deny the grounds of forfeiture set forth in the petition, they must be taken to be true, and a forfeiture decreed accordingly.

State v. *Atchafalaya Rail Road and Banking Company*, 63.

26. Where in an action against a tutor for a settlement of his accounts, plaintiffs moved that the account rendered by the tutor should be homologated so far as it was not opposed by certain creditors, they cannot be permitted afterwards to allege errors therein. By provoking the homologation, plaintiffs waived their right to oppose the account. *Norès* v. *Carraby*, 292.

27. Where a party to an action is ordered to answer in open court, interrogatories propounded to him by the opposite party, and the latter fails to have a day fixed for answering them, they cannot, on the failure of the former to answer, be taken for confessed. C. P. 351. *Derbes* v. *Décuir*, 491.

VIII. *Agreements between Parties or Counsel.*

28. All agreements between parties or counsel, derogating from the rules of practice fixed by law, must be entered on the minutes of the court, or reduced to writing and filed in the record, or they will not be noticed.

Coffin v. *Pollard*, 124.

POLICE JURY.

1. The assent of a Police Jury to the emancipation of a slave, is not an ordinance requiring the signatures of the President and Clerk on the journal to give it validity, in the meaning of the seventh section of the act of 20th March, 1816, relative to the organization and powers of police juries.

Fanchonette v. *Grangé*, 510.

2. It is not essential to the validity of the acts of a Police Jury that the daily journal should be attested by the president and secretary. The 7th sect. of the act of 20th March, 1816, is directory to the officers of such bodies, and their neglects of duty cannot be allowed to prejudice persons having no power to control or direct them. *Ib.*

3. The assent of a Police Jury is only necessary to the emancipation of a slave, when under thirty years of age. Act 31 January, 1827. Such assent when the slave is thirty years of age, is only necessary to relieve the master from giving bond to remove the slave so emancipated out of the State within one month. Acts of 16 March, 1830, and 25 March, 1831. *Ib.*

PORT WARDENS.

See New Orleans, Master and Wardens of Port of.

POSSESSION.

See Pleading, 7.

PRESUMPTION.

See Evidence, XII.

PRESCRIPTION.

1. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer, where there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. *Willcox*, 83.

2. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mortgagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year.

Prats v. *His Creditors*, 288.

3. The acknowledgment of a debt by an agent, will stop prescription. C. C. 3486. *Greig* v. *Muggah*, 473.

PRIVILEGE.

1. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Clarke* v. *Rosenda*, 27.

2. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Conrad* v. *Prieur*, 49.

3. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*

4. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessary to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Ib.*

5. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them. *Deaver* v. *Bedford*, 245.

6. Where a factor or merchant accepts a bill on the faith of produce consigned to him, it must be considered as an advance on it, and he has, for the amount thereof, the same privilege as though the advance had been made in money; and other creditors, who have no privilege, cannot take the property from him, without paying his advances. *Lambeth* v. *Turnbull*, 264.

7. Where property has been shipped to consignees entitled to a privilege thereon, so that the consignor or owner cannot take it out of their hands without paying their claims, a creditor of the owner cannot attach. *Ib.*

8. A creditor of a consignor, who has attached property of his debtor in the hands of a consignee, who claims a privilege for acceptances made by him on the faith of the consignment, must show, in order to take the property out of the hands of the latter without paying the amount of his acceptances, that the acceptances were not made in good faith, and that the consignee is not bound to pay them. *Ib.*

9. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not create an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons.

Bell v. *Western Marine and Fire Insurance Company*, 423.

10. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained. *Ib.*

11. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3204, sec. 8. *Ib.*

PROHIBITION.

The writ of prohibition is one of the means given to the Supreme Court to enable it to exercise its appellate jurisdiction; and it may be issued either before, or after judgment. C. P. 845, 846. Where judgment has been rendered by a judge not having jurisdiction, and process has issued, the order is to be directed to the party prosecuting and to the officer. C. P. 853.

Clarke v. *Rosenda*, 27.

PUBLIC DOMAIN.

I. *Public Domain in Louisiana and Florida under the Spanish Government.*

II. *Public Lands of the United States.*

I. *Public Domain in Louisiana and Florida under the Spanish Government.*

1. The Spanish Governor of the province of Louisiana, Miro, was invested with the power of granting lands within the province. The Marquis de Casa Calvo, a subsequent Governor, had no such authority, the power of disposing of the public domain having been conferred, in October, 1798, on the Intendant, but the Governor still retained his other civil functions, and was the highest judicial officer in the province. *Murdock* v. *Gurley*, 457.
2. The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida and as having power to grant lands in that province. *Ib.*

II. *Public Lands of the United States.*

3. The penalty, or forfeiture imposed by the 4th sect. of the act of Congress of the 25th April, 1812, relative to claims to lands in that part of Louisiana east of the river Mississippi and the island of Orleans, on persons claiming under the French, British, or Spanish Governments, who may fail to cause the written evidence of their claims to be recorded in the manner directed by that act, cannot be invoked by parties having no grant from the United States to the land in controversy.

Murdock v. *Gurley—application for re-hearing*, 467.

4. The provision of the same section declaring that no grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as directed by that act, shall be admitted as evidence in any court of the United States, against any grant which may be derived from the United States, establishes a rule of evidence for the courts of the United States; but the rule has no binding authority over the courts of the States. *Ib.*
5. A confirmation of a land claim by the United States, amounts only to a relinquishment of all claim thereto on its part. *Ib.*

QUASI-CONTRACTS.

1. One who has been employed by the partners in liquidating the affairs of a commercial partnership, cannot claim a commission in the value of goods divided in kind among the partners; but he is entitled to a compensation proportioned to the trouble to which he was subjected in making such division. *Gillett* v. *Deranco*, 13.
2. Where, after the resignation of his appointment, an attorney who had been employed at an annual salary, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful to them, he may recover compensation therefor.

Carter v. *Second Municipality of New Orleans*, 238.

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QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RACING.

See ALEATORY CONTRACTS.

RECONVENTION.

See PLEADING, V.

RECORDER OF MORTGAGES.

See MORTGAGE.

REDHIBITORY ACTION.

See SALE, VI.

REGISTRY.

1. Art. 2818 of the Civil Code, which requires the contract by which a partnership *in commendam* has been created, to be recorded in the office of the Recorder of Mortgages within six days from the time of its execution, is directory only. The omission to record the contract within that period, will not subject the partner *in commendam* absolutely to all the responsibilities of an ordinary partner towards third persons. So long as the contract is unregistered, he will be liable as an ordinary partner to the creditors of the partnership; but it is otherwise as to those who may contract with the partnership after such registry, whenever made; they being notified of the extent of his responsibility. Notice to third persons is the principal object of the registry. Art. 2819. *Lachomette* v. *Thomas*, 172.
2. So, the neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Ib.*

RESCISSION, ACTION OF.

See SALE, VI.

RES JUDICATA.

1. Action for compensation for services rendered as attorney in fact for de-

fendants, in recovering the amount of a succession. Plaintiff had previously presented his claim in the form of an opposition to the account filed by the executor, to the Court of Probates before which the succession was opened, and judgment had been rendered against him. The exception of *res judicata* being pleaded, founded on this judgment: *Held*, that the exception should be overruled. *Per Curiam*. The Court of Probates has jurisdiction of claims against the estates of persons deceased; but the plaintiff's was against the defendants, for services rendered after the death of their ancestor. *Mallard* v. *Borges*, 15.

2. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy* v. *Bell*, 418.

3. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *Ib.*

4. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *Ib.*

ROADS AND LEVEES.

The act of 13th March, 1837, ch. 94, relative to the roads, and levees, in front of the property of non-residents in the parish of Plaquemines, providing a summary mode of disposing of the property of absent proprietors, the proceedings under it should be closely scrutinized.

Jeannin v. *Millaudon*, 76.

RULE OF COURT.

The party interested in establishing that a rule of an inferior court has been violated, must show its existence by the record. *Denton* v. *Murdock*, 127.

RULE TO SHOW CAUSE.

1. A rule having been taken on the surety in an attachment bond to show cause why he should not pay the amount of the judgment against his principal, the former, on the return day of the rule, demanded to see the bond, which, having been misplaced, could not be produced: and the parties separated, the rule not having been discharged, made absolute, or extended. Judgment having been afterwards rendered in favor of the plaintiff in the rule, without further notice to defendant, in an action by the latter to annul: *Held*, that a new rule should have been taken, and that the judgment must be annulled. *McKeever* v. *Keyes*, 61.

2. A rule to show cause requires no other citation than the notification of the rule. The party against whom it is taken is bound to answer it, within the time fixed, and no judgment by default is necessary to render it absolute, which may be done on the day fixed for its trial. *Succession of Porter*, 96.

3. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Ib.*

4. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767 of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin* v. *Delaroderie*, 202.

5. The owner of an unliquidated claim against a succession, cannot obtain judgment therefor, by a rule to show cause taken against the administrator. The action must be brought in the ordinary manner, before the Court o Probates in which the succession was opened. *Succession of Jacobs*, 270

SALE.

I. *Form and Requisites of a Sale.*
II. *Warranty.*
III. *Obligations of Vendee.*
IV. *Putting Vendee in Default.*
V. *Actions for Supplement or Diminution of Price when Prescribed.*
VI. *Rescission on account of Redhibitory Defects, Frauds, &c.*
VII. *Privilege of Vendor.*
VIII. *Judicial Sales.*

I. *Form and Requisites of a Sale.*

1. One claiming under a bill of sale, signed by an attorney in fact of the vendor, must prove the authority of the attorney. *Wells* v. *McMaster*, 154.

2. Where one stipulates in a sale that his vendee shall pay to his vendor a balance of the price yet due, the original vendor may be viewed as merely *adjectus solutionis gratia*—entitled to receive, but not to sue for the amount. Not being a party to the contract, he will not be bound by its stipulations, and may continue to look to his own vendee for payment; while, on the other hand, the parties to the agreement may annul it. But if he, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent; and he may sue to recover the amount thus stipulated in his behalf. *Mitchell* v. *Cooley*, 240.

3. Doubts as to the construction of a contract cannot avail one, who, not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Ib.*

4. Where one stands by, and sees his property sold under legal process, without making his claim known, or objecting thereto, he will be bound by the sale. *Beach* v. *McDonough*, 352. *Marsh* v. *Smith*, 518.

5. A husband living with his wife in a house belonging to her, and attending with her to a retail shop kept in the same building, sold the contents of the shop to her in part payment of paraphernal funds received by him. *Held*, that these facts proved a sufficient delivery.

Larochette v. *Her Husband*, 494.

II. *Warranty.*

6. The vendor may be bound in warranty, at least for the restitution of the price, though there be no stipulation to that effect, unless, being aware of the danger, the vendee purchased at his own risk. C. C. 2481.

Jeannin v. *Millaudon*, 76.

7. Where, by the terms of a sale, the vendor undertakes to procure a certificate from the Recorder of Mortgages showing that no incumbrances exist on the property, before the vendee is to be required to pay, the court will not order the price to be paid, even into court, before the production of such a certificate, though it should be proved that the incumbrances might be paid off out of the price. To do so, would be to alter the contract.

Sewell v. *Willcox*, 83.

8. Where cotton, sold by the bale, does not correspond with the samples, by reason of some defect or vice unknown to the vendee at the time of delivery and acceptance, he will be entitled, even when there is no fraud, to recover the difference between the price, and the value of the article as affected with the defects and vices existing at the time and place of delivery; as well as the charges necessarily incurred in a foreign port, to which it is shipped, in consequence of discovering that it was falsely packed, and of inferior quality. *Stiff* v. *Nugent*, 217.

9. In an action, by the purchaser, for damages in consequence of the inferiority of the article to that of the samples by which it was sold, interest may be recovered, at five per cent, from judicial demand, but not from the date of the purchase. *Ib.*

10. The commencement of a suit for freedom by a slave sold by plaintiff to defendants, cannot justify the latter in withholding the price, nor is it ground for annulling the sale. All that defendants can require is security for the title, or for reimbursement for the price in case of eviction.

Carson v. *Dwight*, 484.

11. In an action for the price of a slave, resisted on the ground of a suit for freedom having been instituted by such slave, for the purposes of justice the court may order a stay of execution till security be given against the danger of eviction, though not prayed for in the answer, and even though there be no prayer by defendant for general relief. *Ib.*

12. A vendor who fails to comply with his obligation to release a mortgage on the property sold, and thereby impedes or prevents its resale, or subjects his vendee to unnecessary expense, or the title to doubt, will be responsible in damages. *Wilkins* v. *Bassett*, 492.

III. *Obligations of Vendee.*

13. Defendants purchased jointly certain lots of ground, giving their separate notes, payable at different periods, each for one-third of the price. The act of sale declared, that they were interested in the purchase in the same proportion; and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers having paid their notes, plaintiff obtained an order of seizure and sale, against the whole property, for the amount of the remaining note. *Held*, that the obligations of the purchasers, though in the same act, are as separate and distinct as if made by different contracts at different times, each purchaser being only bound for his third of the price; and that the notes of each were intended to be secured by a mortgage on his portion only of the property. *Erwin* v. *Greene*, 70.

14. Proof of the promise of a purchaser at an auction sale, to pay any loss that may result from a resale of the property on his account, and of his authority to the auctioneer to do the best he could with the property, will dispense with the evidence which would otherwise be necessary in ordinary case of sale *à la folle enchère*. *Forsyth* v. *Wilkinson*, 263.

IV. *Putting Vendee in Default.*

15. Defendant sold plaintiff property, the price to be paid as soon as certain mortgages thereon should be cancelled. The mortgages not being removed, the latter notified the former that unless they were cancelled, within a given time, he would sue to annul the contract, but made no offer (*offre labiale*) to pay the price. *Held*, that the vendee was not legally put in default—C. C. 1907; and that as no time was mentioned in the contract within which the mortgages were to be cancelled, the putting of the vendee in default, was an indispensable pre-requisite to the rescission of the contract on the ground of his failure to comply with his obligation to cancel them. Ib. 1906.
Sewell v. *Willcox*, 83.

16. To recover in an action for the difference between the price for which a slave was sold to the defendant, and that subsequently obtained on a sale made at the purchaser's risk, on his failure to comply with the terms of the first sale, where there is a general denial, plaintiff must prove that defendant was put *in mora* before the second sale. *Petit* v. *Laville*, 117.

V. *Actions for Supplement or Diminution of Price, when Prescribed.*

17. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer, wher e

there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. *Willcox*, 83.

VI. *Rescission on account of Redhibitory Defects, Fraud, &c.*

18. Where a purchaser at a credit sale, availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent per annum, from the price of such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate.

Dowlin v. *New Orleans and Nashville Rail Road Company*, 5.

19. Where the vendor remains in possession of the thing sold, it will be presumed that the sale was simulated; and, with respect to third persons, the parties must prove that they are acting in good faith, and establish the reality of the sale. C. C. 2456. *Bell* v. *Dowly*, 18.

20. The purchaser of bank stock, which, according to the usage of the bank, could only be transferred to him on his compliance with certain forms, cannot annul the sale, where he has failed to put the vendor in default, after placing himself in a condition to receive the transfer by complying with the regulations of the bank. *Jones* v. *Sidle*, 65.

21. In an action for a rescission of a purchase made by plaintiffs of defendant's interest in a partnership existing between them, as to the value of which they were deceived by the fraudulent representations of the latter, for a dissolution of the partnership on account of fraud, and for an account: *Held*, that the main issue between the parties being one of fraud, a document showing exorbitant and unfair charges by plaintiffs for merchandize furnished by them to the partnership, was admissible in evidence under the issue.

Littlefield v. *Beamis*, 145.

22. To succeed in a redhibitory action, the purchaser must have taken such care of the thing sold, as might be expected from a prudent father of a family. *Soubie* v. *Sougernon*, 148.

23. Action to rescind the sale, and recover the price of a slave alleged to be affected with a redhibitory disease. On the trial it was proved, that the slave was sent by plaintiff to a hospital about fifteen months after the institution of the suit, in a dying condition, where she expired six or seven days after. There was no evidence, that she had ever been attended by a physician. *Held*, that it is not enough to show the existence of the disease, at the time of the sale; that to enable the plaintiff to recover, it should have been shown, that the slave had received proper medical treatment. *Ib.*

24. To recover in a redhibitory action, the purchaser must prove that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale; in which case, it will be presumed to have existed before. C. C. 2508.

Fox v. *Walsh*, 222.

VII. *Privilege of Vendor.*

25. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained.

Bell v. *Western Marine and Fire Insurance Co.*, 423.

26. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3204, sec. 8. *Ib.*

VIII. *Judicial Sales.*

27. An opposition by a mortgage creditor, to the homologation of a sheriff's sale was dismissed, though no proof had been adduced of the publication of the monition. The monition, being subsequently published, and proved, a judgment of homologation was rendered. The opponent, having appealed from the judgment of dismissal, *Held*, that being an hypothecary creditor, the appellant had sufficient interest to make opposition; that the court erred in dismissing his opposition, without evidence that the monition had been published; and that the judgment of homologation subsequently rendered cannot prejudice him, though it may be conclusive as to others.

Fortier v. *Zimpel*, 189.

28. The obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser on his eviction, the money received by the former, is merely statutory, (C. P. 711, *et seq.*) and it cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by the plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from the defendant in the execution, the whole sum paid by him. He is entitled to a joint action against both the parties to the execution—against the plaintiff, for the amount received by him, and against the defendant, for the whole sum paid.

Cleary v. *Second Municipality of New Orleans*, 247.

SENATE.

See GOVERNOR AND SENATE.

SERVITUDE.

The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title, with respect to perpetual and apparent servitudes thereon. C. C. 763.

Barton v. *Kirkman*, 16.

SHERIFF.

1. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767, of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin* v. *Delaroderie*, 203.

2. Where a sheriff, by whom property has been sold under a first mortgage, pays over the surplus of the proceeds, remaining after its satisfaction, in discharge of subsequent general mortgages, binding on the defendant, he will not be liable to the latter, the act causing him no damage.

Powell v. *Kellar*, 272.

SHIPPING.

1. The consignees of a vessel, who receive goods belonging to a third person residing in another place, and re-ship them by a steamer to him, will not be responsible for any loss resulting from a fortuitous event, as the snagging of the steamer, where compensation is claimed only on the ground, that the goods should have been reshipped sooner, and not for the omission to insure. *Deaver* v. *Bedford*, 245.

2. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them.

Ib.

3. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained.

Bell v. *Western Marine and Fire Insurance Co.*, 423.

4. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3204, sec. 8.

Ib.

See Slaves.

SLANDER.

1. In an action for slander, malice need not be expressly proved; it may be implied. *Kernan* v. *Chamberlin*, 116.

2. Though a defendant may have acted without malice, yet, if his conduct has been marked by great imprudence, and a want of due regard for the rights

and feelings of the plaintiff, he will be responsible to the latter, for whatever damage his conduct has caused. C. C. arts. 1928, No. 3, 2294, 2295. *Ib.*

SLAVES.

1. The act of 25th March, 1840, chap. 80, relative to the transporting of slaves out of the State, against the will of their owners, applies to all slaves received on board of a steamer, or other vessel within the State, without the written consent of their owners, wherever the latter may reside, whether in, or out of this State. *Feltus* v. *Anders*, 7.

2. Under the first section of the act of 25th March, 1840, the testimony of a witness employed on any steamer or other vessel, on board of which a slave shall have been found, without the written consent of his or her owner, is inadmissible to destroy the legal presumption, established by that act, that the master and owners have received, or hidden, or suffered such slave to remain on board with the intention of depriving the owner thereof, or of transporting him or her out of the State, or from one part thereof to another; but it is admissible to disprove any statements in relation to the facts out of which this presumption grows, such as the finding of the slave on board, the taking from some point within the State, &c. *Ib.*

3. The act of 25th March, 1840, chap. 80, amending the acts previously in force relative to the transportation of slaves out of the State, against the will of their owners, is one of great severity, and must be strictly construed. *Winston* v. *Foster*, 113.

4. The presumption created by the first section of that act does not exist, where a runaway slave, concealed on board of a vessel, is discovered by the captain, and not by the owner of the slave, and the former pursues the course pointed out by law, for restoring the slave to his owner, and the latter actually recovers possession of him. *Ib.*

5. Where a slave, concealed on board a vessel, is carried away and lost to the owner, the master and owners of the vessel will be responsible for his value, though he was received on board by a person employed on the vessel, contrary to the orders, and without the knowledge of the master and owners thereof. The latter are answerable for the damage occasioned by the acts of those they employ, and cannot excuse themselves on the plea, that they were done contrary to their orders, and without their knowledge. C. C. 2299. *Ib.*

SPANISH GOVERNMENT OF LOUISIANA.

1. The Spanish Governor of the province of Louisiana, Miro, was invested with the power of granting lands within the province. The Marquis de Casa Calvo, a subsequent Governor, had no such authority, the power of disposing of the public domain having been conferred, in October, 1798, on the Intendant, but the Governor still retained his other civil functions, and was the highest judicial officer in the province. *Murdock* v. *Gurley*, 459.

2. The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida, and as having power to grant lands in that province. *Ib.*

STATUTES.

I. *Statutes of the United States.*
II. *Statutes of the State.*
III. *Statute of Tennessee.*

I. *Statutes of the United States.*

1800, April 4. Bankruptcy. *Clarke* v. *Rosenda*, 27.
1812, April 25, § 4. Relative to claims to lands in Louisiana, east of island of New Orleans. *Murdock* v. *Gurley—Application for Re-hearing*, 467.
1819, March 3. Adjusting land claims in district east of island of New Orleans. *Murdock* v. *Gurley*, 457.
1824, May 26. Regulating practice in Courts of the United States in Louisiana. *Garrard* v. *Reed*, 506.
1838, July 7. Relative to vessels propelled by steam. *Kelly* v. *Benedict*, 138.
1841, August 19. Bankruptcy. *Clarke* v. *Rosenda*, 27. *Vidal* v. *Ocean Insurance Company*, 68. *City Bank of New Orleans* v. *Walton*, 158. *West* v. *His Creditors*, 261. *Harrod* v. *Burgess*, 449.

II. *Statutes of the State.*

1805, March 31. Creating master and wardens of port of New Orleans. *Nicholson* v. *Thompson*, 367.
1807, March 9. Emancipation of slaves. *Mathews* v. *Boland*, 200.
1812, September 5. Power of appointing to office. *Nicholson* v. *Thompson*, 367.
1813, March 20. ——————————. *Ib.*
——————— 26. Recording of certain acts. *Lachomette* v. *Thomas*, 172.
1816, February 13, § 5. Transporting slaves out of the State, against will of owner. *Winston* v. *Foster*, 113.
——, March 16. License to practice as Physician. *Dickerson* v. *Gordy*, 489.
——————— 20, § 7. Organization and powers of Police Juries. *Fanchonette* v. *Grangé*, 510.
1817, February, 18. License to practice as Physician. *Dickerson* v. *Gordy*, 489.
1820, March 1. ——————————. *Ib.*
1825, February 19. Organizing City Court, and repealing acts creating

Justices of the Peace and constables for New Orleans. *Nicholson* v. *Thompson*, 367.

1827, January 31. Emancipation of slaves. *Mathews* v. *Boland*, 200.

——, March 24. ——————. *Ib.* *Fanchonette* v. *Grangé*, 510.

1828, March 25. Amending Civil Code and Code of Practice—commission to take testimony. *Hallock* v. *Caruthers*, 190.

1830, March 16. Emancipation of slaves. *Mathews* v. *Boland*, 200. *Fanchonette* v. *Grangé*, 510.

1831, March 25. ——————. *Ib.* *Ib.*

1832, April 2. Incorporating Union Bank of Louisiana. *Arrieux* v. *Dugas*, *Rehearing*, 457.

1833, April 1. Incorporating Commercial Bank of New Orleans—§ 21, 23. *Mayor &c. of New Orleans* v. *Commercial Bank of New Orleans*, 234:—— § 37. *Second Municipality of New Orleans* v. *Same*, 151.

1835, April 1, § 4. Bonds and Recognizances taken in New Orleans. *State* v. *Desforges*, 253.

———— 2. Bonds and Recognizances in Criminal Cases. *Ib.*

1837, January 31. Emancipation of slaves. *Fanchonette* v. *Grangé*, 510.

——, February 28. Authentication of Foreign Documents. *Rosine* v. *Bonnabel*, 163.

——, March 11. Providing for support of Charity Hospital. *State* v. *Desforges*, 253.

———— Bonds and Recognizances in Criminal Cases. *Ib.*

———— 13. Roads and Levees in Plaquemines. *Jeannin* v. *Millaudon*, 76.

1839, March 14. Establishing Commercial Court of New Orleans. *Gove* v. *Breedlove*, 78.

1840, March 25. Transporting slaves out of the State against will of owner. *Feltus* v. *Anders*, 7. *Winston* v. *Foster*, 113.

1841, February 10, § 17. Trial by Jury in the District Parish, and Commercial Courts in New Orleans. *Guillotte* v. *Thompson*, 141.

1842, February 5, § 7. Reviving Charters of Banks in New Orleans. *State* v. *Atchafalaya Rail Road and Banking Co.*, 63.

——, March, 26. Roads and Levees in Concordia. *State* v. *Desforges*, 253.

III. *Statute of Tennessee.*

Authorizing sureties who have paid debt of principal to obtain judgment against the latter by motion, without notice, on mere verdict of jury as to fact of suretyship. *McNairy* v. *Bell*, 418.

SUBROGATION.

1. The conventional subrogation in favor of a third person, from whom the creditor has received payment, must be expressed, and made at the time of

the payment. C. C. 2156. Facts going to show the unexecuted intention of the parties, will not suffice. *Harrison* v. *Bisland*, 204.

2. One who binds himself unconditionally, or furnishes money, for the payment of a debt, does not thereby entitle himself to the right of the creditor who is thus paid. A legal subrogation exists in favor, not of all who pay a debt, but only of those who, being bound for it, discharge it. *Ib.*

3. Legal subrogation results from the payment of a bill of exchange, or promissory note, by an endorser, though made before maturity. The endorser is included in the third paragraph of art. 2157 of the Civil Code, he being bound with, or for the maker or acceptor, and the article referring to all obligations whatever, whether absolute or conditional.

Wiggin v. *Flower*, 406.

4. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Ib.*

5. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Ib.*

6. Plaintiffs accepted a bill payable at a future period, which was endorsed by the payee to third persons, by whom it was endorsed to a Bank, which discounted the bill in their favor. The latter having paid the bill, before maturity, in notes of the Bank, which were under par, claimed the whole amount of the bill from the acceptors. *Held*, that plaintiffs did not, by the endorsement and discount of the bill, and the subsequent depreciation of the notes of the Bank, acquire *ipsis factis*, any more than an inchoate and incomplete right to pay in such depreciated notes, not being parties to any act or contract from which such a right might result; that not having manifested any intention to avail themselves of the advantage which the depreciation of the Bank notes offered, until, by the payment of the bill, the endorsers had acquired the rights of the Bank thereto, plaintiffs were in the same situation in which they would have been, had the Bank transferred the note at any time after its discount; and that, by their acceptance, plaintiffs bound themselves to pay to the order of the payee, the whole amount of the bill, that the endorsers became entitled thereto by the transfer of the bill, that the Bank acquired their rights by the discount, and that, the endorsers,

by the payment of the bill, acquired a legal subrogation to the rights of the Bank. *Ib.*

See SURETY, 2.

SUBSTITUTION.

1. Clauses in a will limiting the testatrix's power to dispose of the legacies after their reversion to herself, are nugatory, and do not amount to a substitution. *Barnes* v. *Gaines*, 314.

2. Where a testatrix directed by her will "that in case any of the legatees should die before her, the share of the deceased legatee shall go to his children, their heirs or assigns," and this direction was not changed by her, after the death of the legatee: *Held*, that this clause does not contain a substitution; that the death of either of the legatees before the testatrix, could not prevent her from disposing of her property as she pleased in favor of any other persons; and that the right of the legatee, first instituted, not having accrued, the children, the eventual legatees, would take under the will, without reference to the previous institution. *Ib.*

SUCCESSIONS.

I. *Jurisdiction in matters of Succession.*

II. *Of Executors.*

III. *Of Heirs and Legatees, and of the Acceptance of Successions.*

IV. *Claims against Successions.*

V. *Sale of Property of Successions.*

VI. *Tableau of Distribution, and payment of Debts and Legacies.*

I. *Jurisdiction in matters of Succession.*

1. Where a party has been put in possession of a succession, as testamentary heir, by a decree of the Court of Probates, that court is divested of all control over the estate; and one who claims the property as the heir at law of the deceased, must proceed before the courts of ordinary jurisdiction. Nor is it requisite, before instituting such revendicatory action, that the claimant should be recognized as heir by the Probate Court; this is only required while the succession continues under the supervision of the court by which the executor, administrator, or curator was appointed. *Layre* v. *Parco*, 9.

2. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983. *Barnes* v. *Gaines*, 314.

II. *Of Executors.*

3. The commission of two and a half per cent allowed to executors by art. 1676 of the Civil Code, cannot be claimed on the value of waste, uncultivated land. Such land cannot be considered as a part of the productive property of the succession. *Succession of Milne*, 48.
4. Neither the validity of a will under which a plaintiff holds the appointment of a testamentary executor, nor the certificate of his appointment from the Court of Probates, can be inquired into collaterally, in a controversy between the executor and a debtor of the succession represented by him. The court cannot look beyond the certificate of his appointment, or letters testamentary; and until the will be regularly annulled, which cannot be done in the absence of those having an interest under it, he will be entitled to exercise the powers conferred on him by law. *Maskell* v. *Roupel*, 500.

III. *Of Heirs and Legatees, and of the Acceptance of Successions.*

5. The State can only take a succession where there is no one entitled to the inheritance, or where it is not claimed by any one having a right thereto. C. C. 477, 911, 917, 923. Such was the case under the code of 1808, and under the Spanish laws. *Layre* v. *Pasco*, 9.
6. Natural brothers and sisters will inherit from each other, where their father and mother died before the child from whom the estate descends. C. C. 917. Article 923 of the Civil Code does not exclude the idea of natural brothers and sisters being entitled to inherit. It must be construed with reference to the preceding articles. Arts. 923 and 917 must be regarded as one continuous act of legislation *in pari materia*. *Ib.*
7. Where one claims, as the heir of his mother, against a third person in possession, property which belonged to the community of *acquêts* existing between his parents, he must show that his father had such a title, at the dissolution of the community, as would have enabled him, in his own right and as tutor of his son, to maintain a petitory action for the property; for if any contracts or engagements were entered into by the father, during the existence of the community, which were binding on him, showing that his apparent title was not a real one, whether evidenced by private writings shown to exist, and proved by extrinsic evidence to have a real date, or by authentic acts, they must have been binding on the community, and descended to the heir of the wife as a necessary burden upon his inheritance, estopping him from disturbing a title derived from the community.

   Caldwell v. *Hennen*, 20.
8. A legatee of mortgaged property cannot require to be proceeded against as a third possessor, where it is not shown that she has been put in possession of the property. *Succession of Porter*, 96.
9. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 120. C. C. 1370, *et seq*; *aliter* as to co-obligors by

joint contract, all of whom must be sued together. C. C. 2080 *et seq.* In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan* v. *De Lizardi*, 224.

10. The assumption of the quality of heir in an authentic act, is an unconditional acceptance of the succession. C. C. 982. *Greig* v. *Muggah*, 473.

IV. *Claims against Successions.*

11. Art. 986 of the Code of Practice, does not apply to a liquidated claim secured by a special mortgage. A mortgage creditor is not bound to bring a suit against the succession, before calling on the curator or administrator for the payment of the debt. A simple order from the Probate Judge is sufficient. *Succession of Porter*, 96.

12. Unliquidated claims against a succession, need not be presented to the administrator for his approbation, before commencing an action therefor. C. P. 984, 986. *Succession of Jacobs*, 270.

13. The owner of an unliquidated claim against a succession, cannot obtain judgment therefor, by a rule to show cause taken against the administrator. The action must be brought in the ordinary manner, before the Court of Probates in which the succession was opened. *Ib.*

V. *Sale of Property of Successions.*

14. Mortgage creditors of a succession, though it be insolvent, are not bound to wait; they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and their wish must always prevail, in this respect, over that of the other creditors. C. C. 1163, 1663. C. P. 990, 991, 992, 995. *Succession of Porter*, 96.

15. Where a probate Judge orders the sale of mortgaged property to be made for cash, it is not necessary that he should insert in the order the condition imposed by law, that its appraised value be obtained. The law itself fixes the amount the property must bring, when the sale is for cash; and unless the appraised value be obtained, there can be no adjudication. *Ib.*

16. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Succession of Porter*, 96.

VI. *Tableau of Distribution, and Payment of Debts and Legacies.*

17. No part of the property or funds of a succession should be applied to the discharge of legacies, until the creditors are satisfied.
Succession of Porter, 96.

18. The usual publication in the newspapers, calling on all whom it may concern, to show cause, if any they can, why a tableau of distribution of the effects of a succession should not be homologated, is sufficient notice. No citation, or actual notice is necessary. *Arrieux* v. *Dugas*, 453.

SUMMARY PROCEEDINGS.

1. The act of 13th March, 1837, ch. 94, relative to the roads, and levees, in front of the property of non-residents in the parish of Plaquemines, providing a summary mode of disposing of the property of absent proprietors, the proceedings under it should be closely scrutinized. *Jeannin* v. *Millaudon*, 76.
2. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Succession of Porter*, 96.

SURETY.

1. Suretyship must be stipulated expressly. It cannot be presumed. C. C. 3008. *Erwin* v. *Greene*, 70.
2. Where the lessors of property, without the consent of the sureties of the lessees, take back a part which had been occupied by the lessees as a dwelling, and relet it to a third person, the sureties will be released, the contract being materially altered without their assent. *Per Curiam.* It must be presumed, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation to which they were legally entitled to the lessors' rights and privileges, among others, upon the furniture which existed in the dwelling house. C. C. 2675, 2676, 2677, 2679, 3030. *Penn* v. *Collins*, 213.
3. Where the lessors of property, having sued the lessees for the rent due, and to come due under the contract, and caused property, on which they had the lessors' privilege, to be seized to an amount equal to the rent due, and to come due, abandon the seizure without a trial, the sureties of the lessees will be discharged. *Ib.*
4. Though the obligation of an endorser or surety cannot be enforced till after the event on which it becomes absolute, it exists from the time when it was contracted, for it is susceptible of being compromised, released or transferred, and of passing to heirs, &c. So the rights of the endorser, or surety, against the maker or principal, exist before the obligation of the former becomes absolute. *Wiggin* v. *Flower*, 406.
5. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Ib.*
6. Endorsers and sureties are, under the Civil Code, conditional obligors of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. Though no conservatory acts can be exercised

against the conditional debtor by endorsement, until his obligation becomes absolute, both the endorser and the surety, may, under art. 2037 of the Civil Code perform all acts conservatory of their respective rights, even before their own obligations have become absolute. *Ib.*

7. A surety can claim nothing more than indemnification. *Ib.*

8. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, results from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Ib.*

9. Ordinary endorsers are not placed on the same footing as sureties; nor can they, like the latter, claim the benefit of discussion. *Ib.*

10. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *McNairy* v. *Bell*, 418.

11. The interest of the party by whom property is held as security, is an insurable one. Hence the right of agents, consignees and factors, to insure the goods of their principals.

Bell v. *Western Marine and Fire Insurance Company*, 423.

12. Where a debtor has made a *cessio bonorum*, all his debts, whether payable then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Légér* v. *Arcenaux*, 513.

SURVEY.

Natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled. *Le Breton* v. *Lewis*, 479.

THIRD PERSONS.

Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs.

Caldwell v. *Hennen*, 20.

TRUST.

Nothing in the laws of this State prohibits a party from holding in his own name lands belonging to another, subject to the order of the latter. Such an arrangement has no analogy to the *fidei-commissa* abolished by the Civi Code. By the latter, the trustee is bound to retain for, and deliver to a third person, the thing confided to him, which is placed beyond the control of the person creating the trust. *Caldwell* v. *Hennen*, 20.

VERDICT.

See JURY, 1, 8.

WARRANTY.

See SALE, III.

WILL.

See DISPOSITIONS MORTIS CAUSA.

END OF VOLUME V.